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THE

CONTRACT OF AFFREIGHTMENT

AS EXPRESSED IN

CHARTERPARTIES

AND

BILLS OF LADING.

BY

T. E. SCRUTTON, M.A. LL.B.,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW, BARSTOW SCHOLAR OF THE INNS OF COURT; LATE SCHOLAR OF TRINITY COLLEGE, CAMBRIDGE; AUTHOR OF 'THE LAWS OF COPYRIGHT,' ETC.

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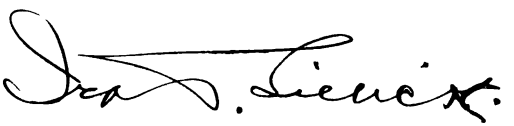

TO

LORD ESHER,

This Work,

LARGELY COMPILED FROM HIS JUDGMENTS,

IS RESPECTFULLY DEDICATED

BY

THE AUTHOR.

PREFACE.

THE last twenty years have seen what almost amounts to a revolution in the shipping trade of Great Britain. Steamers have supplanted sailing vessels, and the electric telegraph has placed the centres of commerce throughout the world in immediate communication with each other. At the beginning of this century, sailing ships made their one or two voyages a year, in a not too hurried manner, and the time of those voyages varied enormously as winds and waves might ordain. The master, absent from his owners for long periods, and without any power of speedy communication with them, had in all foreign ports great powers and great responsibilities in the employment of the ship. Shipowners carried goods under the terms of a short and simple bill of lading.

The introduction of steam and the telegraph have changed all this. Ocean cables enable the shipowner to direct the employment and transact the business of his ship abroad while sitting in his office in London, and the master has become little more than the chief navigator of the vessel. The mighty power of steam enables regular voyages to be calculated on, while the large amount of capital invested in a steamer and the keen competition it meets compel the shipowner to take advantage of every hour and minute that can be saved in its employ. Shipowners also have gradually protected themselves by exceptions in their bill of lading against every risk of liability for damage to the goods they carry, until the bill of lading contains fifty or sixty

lines of closely printed conditions and exceptions, and there appears to be no duty imposed on the fortunate shipowner but that of receiving the freight.

This great commercial change seems to justify new works on commercial law, as compared with new editions of the old works whose value no one will question, but which were compiled under a different state of business relations. Re-editing, to satisfactorily adapt such works to modern commerce, must almost be re-writing. Cases such as *Sewell* v. *Burdick*, or *Jackson* v. *The Union Marine Insurance Co.*, cannot, without a great want of proportion, be relegated to footnotes, and commercial practice has rendered obsolete much of the old learning. It is of very little use to set out the "ordinary authority of a master" as founded on cases before 1860, when in 1886 the master's functions in port have been reduced almost to the vanishing point.

In the following pages I have therefore endeavoured to combine the statement of the law with an account of the commercial practice of to-day, and I have not scrupled to omit old authorities which have become by change of time obsolete: while I have set out what the law is in the absence of express agreement, I have also added to it the clauses in an ordinary bill of lading of the present day which supersede or modify it.

I have endeavoured to reduce the rather chaotic mass of details which make up commercial law to a series of principles in the form of a digest. Lord Bramwell has forcibly described some of the cases on shipping as "cases where no principle of law is involved, but only the meaning of careless and slovenly documents;" and owing to the mass of ever-varying detail which the numerous forms of bills of lading and charters have heaped up, there is probably no subject where it is more difficult to get the better of the particulars of each case, to "see the wood through the trees." I have, however, attempted to express the law relating to the con-

tract of affreightment, as expressed or implied in charters and bills of lading in the form of propositions, with illustrative cases, and I have added thereto a consideration of the position of the bill of lading as a document of title. The difficulty of such a task will be the most satisfactory excuse for the inevitable errors and omissions that critics may discover; any success I may have achieved will I hope justify the attempt.

I have added to the statements of the law, notes either discussing the numerous legal difficulties which arise, or stating the present commercial practice on the point. I have considered in writing this part of the work all the principal bills of lading in use in London and Liverpool, and have had the advantage of the fullest information and assistance from members of my family engaged in commerce. In the cases illustrating the statements of the law, I have endeavoured to make the task of following them easier, by the adoption of a uniform alphabetical notation, explained at the commencement of the work. I have added in the appendices a few of the leading forms of bills of lading and charters, with references to the part of the work where each clause is discussed; a statement of the customs of loading and discharge in the leading ports of Great Britain, compiled from information supplied by merchants in each port; the leading statutes on the subject; and some documents bearing on general average. I have endeavoured by a full and careful index to make the book useful to business men, and in the index of cases have provided references to all the reports.

Lord Esher has kindly allowed me to associate this book with a name conspicuous, even on the page of legal history which bears the names of Mansfield, Lawrence, Parke, and Willes, among those who have both based our law on principle and adapted it to the necessities and usages of commerce.

I am much indebted to those both in London and the

other great ports of the kingdom, who have helped me with information and suggestions which I trust ensure the accuracy of the commercial part of this work. I hope these pages will be useful to shipowners and others engaged in commerce as an account of their legal position as clear and plain as the law itself will allow, and to lawyers as a statement of law based on principle, and contrasted with modern practice. I have tried not to shirk difficulties, or to omit cases and details. Experience must show whether I have been successful in meeting a want.

T. E. S.

1, Essex Court, Temple.
Oct. 25, 1886.

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ALPHABETICAL GUIDE TO CASES.

In the illustrations contained in the following pages, an attempt has been made to lessen the labour of mastering the facts by using particular letters to represent particular characters in the case. Thus, except in a few cases where they obviously stand for places, A is always a shipowner, C a charterer, G a consignee; X is always the port of loading; Z, the port of discharge.

A	=	shipowner.
B	=	shipowner's agent.
C	=	charterer.
D	=	charterer's agent.
E	=	captain.
F	=	shipper.
G	=	consignee.
H, I	=	indorsees of bill of lading.
P	=	purchaser of goods shipped.
R, S	=	ships.
V	=	unpaid vendor of goods shipped.
W	=	agent of such a vendor.
X	=	port of loading.
Y	=	port of call, or of refuge.
Z	=	port of discharge.

ADDENDA ET CORRIGENDA.

The Xantho (cited at pp. 100, 149, 159, 160, 161, 162, 169, 200) is now reported in 55 L. T. 203.

Pandorf v. *Hamilton* (cited at pp. 149, 158, 160, 161) is now reported on appeal in 17 Q. B. D. 670.

In the case of *Sailing Ship Garston* v. *Hickie Borman*, heard by the C. A. on October 28, 1886, the Court decided that a collision, caused by negligence of another ship, was within the exception "dangers and accidents of navigation," though the negligence of the carrying ship was not. Note this under Articles 83, 84; and correct the proposition *submitted* on p. 158, by striking out the words "and navigation."

In the case of *Nottebohm* v. *Richter*, heard by the C. A. on October 30, 1886, the Court had to construe a clause in a charter, cargo to be taken from the river bank "*at ship's risk* and expense." The goods were lost before loading by perils of the seas, and the Court held that the ship's risk was the same before and after loading, the excepted perils applying when the cargo was taken from the bank, and that therefore the ship was not liable. "At ship's risk" means "at the same risk as the ship would incur after loading." Note at pp. 149, 151.

Page 6, note (*p*) *for* 205, *read* 105.

Page 45, note (*u*) *for* 860, *read* 86.

Page 46, note (*d*) *for* 320, *read* 330.

Page 50, *Graves* v. *Legg* is reported on appeal, 2 H. & N. 210.

Page 58, *Dutton* v. *Powles* is reported on appeal, 2 B. & S. 174.

Page 65, *Farrant* v. *Barnes* is also reported at 11 C. B., N. S. 553.

Page 125, *Cassaboglou* v. *Gibb* is reported on appeal, 11 Q. B. D. 797.

Page 198, note (*n*) *for* 41, *read* 414.

Page 212, note (*e*) } the reference to *Barker* v. *Hodgson*, should
Page 213, note (*n*) } be 3 M. & S. 267.

Smith v. *Sieveking* (cited at pp. 38, 40, 216, 217) is reported on appeal at 5 E. & B. 589.

THE

CONTRACT OF AFFREIGHTMENT.

SECTION I.—NATURE AND CONSTRUCTION OF THE CONTRACT.

Article 1.—*Nature of the Contract.*

WHEN a shipowner, or person having for the time the right as against the shipowner to make such an agreement, agrees to carry goods by water, or to furnish a ship for the purpose of so carrying goods, in return for a sum of money to be paid to him, such a contract is called *a contract of affreightment*, and the sum to be paid is called *freight*.

When the agreement is to carry a complete cargo of goods, or to furnish a ship for that purpose, the contract of affreightment is almost always contained in a document called a *charterparty* (*a*), the shipowner letting the ship for the purpose of carrying, or undertaking to carry, the *charterer* hiring the ship for such purpose, or undertaking to provide a full cargo.

Such a document is usually signed before any steps are taken under the contract it contains.

When the agreement is to carry goods which form only part of the intended cargo of the ship, the contract of affreightment as to each parcel of goods shipped is evidenced in a document called a *bill of lading*, which serves also as a receipt by the shipowner, acknowledging that the goods

(*a*) As to stamps on charters, see 33 & 34 Vict. c. 97, ss. 15, 66–68; Appendix III. Charters made entirely abroad can be stamped within two months of their receipt in this country. *The Belfort* (1884), L. R. 9 P. D. 215.

have been delivered to him for a certain purpose. A bill of lading is rarely signed until some steps have been taken in pursuance of the contract it evidences.

By the custom of merchants indorsement of the bill of lading may pass the property in the goods, for the shipment of which it is a receipt; and by statute such an indorsement will also confer on the indorsee the same rights and liabilities as if the contract evidenced in the bill of lading were originally made with him (*b*).

The charterer with whom the shipowner enters into the contract of affreightment may intend to supply the cargo himself. In this case, when the cargo is shipped, a bill of lading will almost always be signed, evidencing a contract between the shipowner and the charterer, and, it may be, a contract adding to or varying the contract between them contained in the charterparty.

Or the charterer may intend to enter into sub-contracts of carriage with other shippers, who provide all or part of the cargo. In this case, as each shipper ships his goods, a bill of lading will be signed, evidencing a contract between the shipper on the one hand, and, according to circumstances, the shipowner or charterer on the other. Such contract will be independent of the contract contained in the charterparty, except in so far as it expressly incorporates it (*c*).

Article 2.—Nature and Effect of a Charterparty.

A charter may operate as a demise or lease of the ship itself, to which the services of the master and crew may or may not be superadded. The charterer here becomes for the time the owner of the vessel, the master and crew become to all intents his servants, and through them the possession of the ship is in him.

Or it may be that all that the charterer acquires by the charter is the right to have his goods conveyed by a particular

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(*b*) See Section V. *post*, Articles 57, 58, 75.
(*c*) See Articles 18, 19, *post*.

vessel, and, as subsidiary thereto, to have the use of the vessel and the services of the master and crew. In this case, notwithstanding the temporary right of the charterer to have his goods loaded and conveyed in the vessel, the ownership, and also the possession of the ship remain in the original owner, through the master and crew, who continue to be his servants.

If the master, by agreement of the owner and charterer, acquires authority to sign bills of lading on behalf of the latter, he nevertheless remains in all other respects the servant of the owners (*d*).

Note.—The modern tendency is against the construction of a charter as a demise or lease. The cases of demise are old cases, and their authority has been somewhat shaken by recent decisions. But each case must turn on the particular terms of the charter. The chief results of the construction of a charter as a demise would be: (1) that the owner, being out of possession, would have no lien at common law for the freight due under the charter; (2) he would not be liable to shippers, who did not know of the charter, for the acts of the master and crew, nor to the charterer for acts of the master and crew; (3) the master would be the agent of the charterer so that delivery to him of goods bought by the charterer would, unless the bill of lading was made deliverable to shipper or order, divest the unpaid vendor's right of stoppage *in transitu*. Under a charter not a demise, the master would be a mere carrier, and not the charterer's agent, and the right of stoppage would remain (*e*): (4) If a chartered ship earned salvage, the salvage reward would go to the charterer if the charter were a demise; to the owner if the charter were not a demise (*f*).

I. Cases in which a charter has been held *not* to be a demise.

Case 1.—A. chartered a ship to C., to sail to X., and load from C.'s agent there, cargo to be stowed at merchant's risk and expense. The captain to sign bills of lading if required at any rate of freight without prejudice to the charter.

At X. goods were shipped by shippers who knew nothing of the charter (*g*) under a bill of lading signed by the master.

(*d*) *Sandemann* v. *Scurr* (1866), L. R. 2 Q. B. 86, 96, and see Art. 18.

(*e*) *Berndtson* v. *Strang* (1868), L. R. 3 Ch. 588; *Ex parte Rosevear China Clay Co.* (1879), L. R. 11 Ch. D. 560. *Vide post*, Articles 68, 69.

(*f*) *Vide post*, Article 121.

(*g*) If they had known of the charter they could only have sued the charterer on the contract. *Newberry* v. *Colvin* (1832), 1 Cl. & F. 283.

Held, that A had not parted with the possession of the ship; that the master was still A.'s servant, and that his signature to a bill of lading bound A. That the stowage of goods was by a stevedore appointed by the charterers, though ultimately paid by the owners, made no difference (*h*).

Case 2.—A. entered into a charter with C. that his ship being staunch, "and so maintained by owners, shall be placed under the direction of the charterer" for conveyance of goods within specified limits. "The steamer to be let for the sole use of charterers and for their benefit for six months. . . . . Charterers to have whole reach of hold and usual places of loading, room being reserved to owners for crew. . . . Captain to use despatch in prosecuting voyage, and crew to render customary assistance in loading; captain to sign bills of lading . . . and to follow the instructions of the charterers as regards loading . . . coals at cost of charterers, owners finding all ship's stores, and paying crew's wages . . . captain to furnish charterers with log, and to use sails when possible to save coals . . . vessel to be returned at end of period by charterers."

As a fact, A. paid the master and crew.

Held, that there was no demise; and that A. was still responsible for acts of the master and crew, both to the public, and to C. (*i*)

Case 3.—A., registered as the "managing owner" of a ship under the Merchant Shipping Acts, made an agreement with E., the master, that E. should take the ship wherever he chose, shipping whatever cargo he thought fit, engaging the crew, and paying A., one-third of the net profits. A. under this agreement had no control over the vessel. E. made a charter, which A. knew nothing about, with C., "between E., master, for and on behalf of the owners." *Held*, that this arrangement did not amount to a demise to E., but that A. still remained liable to the public as "managing owner" (*j*).

Case 4.—C. hired a steamer for the day from A., who sent him this memorandum: "I note the *S.* is engaged to you for X. for May 28, at hire per day of £5, your party not exceeding fifty persons." A. employed and paid the master and crew, who navigated the vessel. *Held*, that C. had no such exclusive possession as to justify him in expelling a stranger who came on board by consent of the captain, though he could sue A. for breach of contract (*k*).

II. Cases where it was held that the charter amounted to a demise.

Case 5.—A. by deed appointed E. to command a ship on a certain voyage, paying a certain freight to A. and retaining the surplus for himself; A. had a super-cargo on board with power to supersede E. if he misconducted himself. By another instrument E. was to be paid wages by A. The deed or charter was made *bonâ fide*, and persons who shipped goods were aware of it. *Held* (by the House of Lords), that E. was owner of the ship *pro tempore*, and was alone liable to shippers on the bill of lading (*l*).

(*h*) *Sandemann* v. *Scurr* (1866), L. R. 2 Q. B. 86.

(*i*) *Omoa Coal and Iron Company* v. *Huntley* (1877), L. R. 2 C. P. D. 464.

(*j*) *Steel* v. *Lester* (1877), L. R. 3 C. P. D. 121; See also *Christie* v. *Lewis* (1821); 2 B. & B. 410; and *Saville* v. *Campion* (1819), 2 B. & Ald. 503; and compare with *Newberry* v. *Colvin* (1832), 1 Cl. & F. 283.

(*k*) *Dean* v. *Hogg* (1834), 10 Bing. 345; see also *Lucas* v. *Nockells* (1828), 4 Bing. 729.

(*l*) *Newberry* v. *Colvin* (1832), 1 Cl. & F. 283.

Case 6.—A. let and C. hired A.'s ship for six months, C. to have entire use and disposal of the vessel, except cabin, and room for crew and provisions; the captain to be appointed by C., and C. to be responsible to A. for the captain's conduct in navigation, but A. to pay him the wages he would pay his own master. *Held*, that C. had possession of the cargo during the contract, and that the captain was in possession of the cargo as agent for C., not for A. (*m*).

Case 7.—A. chartered a ship to C. "to be placed under the direction of C.," to be employed within certain limits as ordered by C. "The said steamer is let for the sole use of C. and for his benefit for three or more calendar months at C.'s option, he having the whole reach and burden of the vessel, freight payable till the vessel is again returned by C. C. to supply coals and pay all wages, expenses, &c., except insurance. The vessel to be delivered up to A. on the termination of the charter in the same good order and condition as when delivered." *Held*, to amount to a demise of the ship to C. (*n*).

Case 8.—A. "granted and to hire and freight let" his ship to the Crown, for transport for three months, and afterwards for so long as required. The master and crew were employed and paid by A. *Held*, that the Crown was temporarily owner, so that A. was not liable for light dues to be paid by "the owners of ships:" and that the master and crew were only employed by A. to enable the Crown to enjoy its ownership to the best advantage (*o*).

Article 3.—*The Bill of Lading.*

A bill of lading is a receipt for goods shipped on board a ship, signed by the person who contracts to carry them, or

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(*m*) *Belcher* v. *Capper* (1842), 4 M. & G. 502. This decision was based on (1) words of demise; (2) C.'s appointment of the master and his liability to A.; but, *Semble*, that the appointment of the master by the charterer would not now be evidence of a demise if he were paid by the owner. See Case 2. (3) That the freight was to be paid to the master, without any stipulation as to his using it to meet payments of freight under the charter; (4) that all cargo was to be delivered before the last payment of freight was due, thus negativing A.'s lien.

(*n*) *Meiklereid* v. *West* (1876), 1 Q. B. D. 428.

(*o*) *Master of Trinity House* v. *Clark* (1815), 4 M. & S. 288. This case, as also *Frazer* v. *Marsh* (1811), 13 East, 238, and *Hutton* v. *Bragg* (1816), 7 Taunton, 14, have been so much distinguished and doubted, especially in *Christie* v. *Lewis* (1821), 2 B. & B. 410, and *Sandemann* v. *Scurr* (1866), L. R. 2 Q. B. 86, that they cannot be considered of much authority. The old style of "granting to hire and to freight let," has dropped out of charters, and the modern form of charter, "It is mutually agreed between A., owner of the *S.* and *C.* that the *S.* shall proceed to X. and then load a cargo," can rarely, if ever, be construed as a demise. Some American charters are made by deed, and run that the parties to the deed "covenant and agree in the freighting and chartering of the vessel," and the charterer "covenants to charter and hire," but the whole frame of the charter shows that no demise is intended. Some charters go so far that the owner only contracts "to provide a screw steamer," of a certain class and tonnage, for a certain voyage. If the charter does amount to a demise, the hirer will not be liable for damage to the ship through the act of God without his negligence: *Smith* v. *Drummond*, 1 C. & E. 160 (1883).

his agent, and stating the terms on which the goods were delivered to and received by the ship. It is not the contract, for that has been made before the bill of lading was signed and delivered, but it is excellent evidence of the terms of the contract (*p*).

The terms of the contract may also be gathered from the charter, where there is one, and either some or all of its terms are either expressly incorporated in the bill of lading, or the charterer is also the shipper (*q*): from shipping-cards (*r*) placards or handbills (*s*) announcing the sailing of the ship; or from representations by the broker, or other agent of the carrier (*t*).

Note.—Shippers are usually well aware of the terms on which goods are shipped in any regular line or trade, as the bills of lading are printed and sold by firms of stationers, the particulars of the goods being filled in by the shippers themselves, who then leave them for signature at the office of the broker of the line. The judgment of Mellish, L.J., in *Parker* v. *South Eastern Railway Co.* (*u*), in its assumption that a person taking a bill of lading must necessarily be bound by all its terms, for he knows that the contract of carriage is contained in it, seems a little too sweeping in view of the actual course of business. Modern bills of lading contain "a long list of excepted perils, exemptions from and qualifications of liability, printed in type so minute, though clear, as not only not to attract attention to any of the details, but to be only readable by persons of good eyesight," and in the middle of some sixty closely packed lines in small type, printed with hardly a break, in red ink on red paper, comes such a novel clause as one—(the bill of lading lies before me now)—"that the owners shall not be responsible, either as carriers *or as contributors to general average*, for any loss or injury to the goods, occurring from any of the causes above-mentioned." On such a clause, the remarks of Lush, J., seem in point: "If a shipper of goods is not aware when he ships them, or is not informed in the course of the shipment, that the bill of lading which will be tendered to him (*sic*) will contain such a clause, he has a right to suppose that his goods are received on

(*p*) Per Lord Bramwell, in *Sewell* v. *Burdick* (1884), 10 App. C. 205.
(*q*) *Vide post*, Articles 18, 19, and see *Rodoconachi* v. *Milburn* (1886), L. R. 17 Q. B. D. 316.
(*r*) *Peel* v. *Price* (1815), 4 Camp. 243.
(*s*) *Phillips* v. *Edwards* (1858), 3 H. & N. 813.
(*t*) *Runquist* v. *Ditchell* (1800), 3 Esp. 64.
(*u*) (1877) 2 C. P. D. 422.

the usual terms, and to require a bill of lading which shall express those terms" (*x*).

A question may therefore arise whether the bill of lading really represents the terms of the contract to which the shipper agreed, as where it contains in small print very unusual clauses. Thus in *Crooks* v. *Allan* (*y*) Lush, J., in delivering judgment said: "If a shipowner wishes to introduce into his bill of lading so novel a clause, as one exempting him from general average contribution . . . . he ought not only to make it clear in words, but also to make it conspicuous by inserting it in such type and in such part of the document that a person of ordinary capacity and care could not fail to see it. A bill of lading is not the contract, but only evidence of the contract, and it does not follow that a person who accepts the bill of lading which the shipowner hands him, is necessarily and without regard to circumstances bound to abide by all its stipulations."

So in *Lewis* v. *McKee* (*z*) the captain was held not affected by a restrictive endorsement on a bill of lading, to which his attention was not called, and, *semble*, in which he could not ordinarily and reasonably be expected to see.

The same principle governs the effect of the restrictive stamps now (1886) being affixed in London to bills of lading for parts of a journey, for which one through bill of lading has already been signed (*a*). The question is similar to that raised in the "cloakroom cases," which are fully discussed in *Watkins* v. *Rymill* (*b*). There would be two questions of fact for the jury: (1) Was the shipper actually aware of the particular clause or stamp; (2) If not, were reasonable means taken to inform him of it, and would a reasonable man have been aware of it?

Article 4.—Effect of Illegality on a Contract of Affreightment.

Where the contract of affreightment cannot be performed without a violation of English law, it is void, whether the parties knew of the illegality or not when it was entered into (*c*).

Illegality by foreign law is treated by English law as impossibility in fact, and discharges the parties where it

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(*x*) *Crooks* v. *Allan* (1879), L. R. 5 Q. B. D. at p. 41.
(*y*) (1879) 5 Q. B. D. 38: and see *Rodoconachi* v. *Milburn* (1886), 17 Q. B. D. 316.
(*z*) (1868) L. R. 4 Ex. 58.
(*a*) *Vide post*, Article 22.
(*b*) (1883) 10 Q. B. D. 178.
(*c*) *Esposito* v. *Bowden* (1857), 7 E. & B. 762; see also *Barker* v. *Hodgson* (1814), 3 M. & S. 267, 270; *Atkinson* v. *Ritchie* (1809), 10 East. 530, at p. 535.

prevents something which they are both bound to do within a reasonable time, not otherwise defined (*d*), but not when it only prevents an act which one of them has agreed to perform within a fixed time (*e*).

Where a contract can be performed in two ways, one of which is legal and the other illegal, it will not be avoided (*f*) unless there is an intention to perform it in the way known to be illegal (*g*).

Case 1.—An Italian ship was chartered by an Englishman to carry wheat from Russia to England; before the ship arrived at the Russian port war was declared between England and Russia, and so continued up to the day when the lay-days for loading would have expired. *Held*, that the declaration of war made commercial intercourse between England and Russia illegal, and that the contract was therefore dissolved by English law (*h*).

Case 2.—C. chartered in France A.'s ship to load pressed hay in France, and proceed direct to London, "all cargo to be brought and taken from ship alongside." C.'s agent told the captain that the hay was to be landed at a particular wharf in London, and the captain assented. At the time of making the charter, the import of French hay into England was illegal by English law, though neither party knew of it. On arrival at London, when landing at the proposed wharf was found illegal, after eighteen days' delay beyond the lay-days, C. unloaded the hay "alongside ship," for export in another vessel; this proceeding was not illegal. To an action by A. for demurrage, C. pleaded that the contract was void for illegality. *Held*, that as the contract could be, and had been, performed legally, by taking the hay alongside for exportation, and as there was no evidence of intention to perform it illegally with knowledge of its illegality, it was not void, and C. was liable for demurrage (*i*).

(*d*) *Ford* v. *Cotesworth* (1870), L. R. 5 Q. B. 544; *Cargo ex Argos* (1873), L. R. 5 P. C. 157, and note *s* to Article 132, *post*.

(*e*) As in *Blight* v. *Page* (1801), 3 B. & P. 295, note; see also *Kirk* v. *Gibbs*, (1857), 1 H. & N. 810.

(*f*) *Waugh* v. *Morris* (1873), L. R. 8 Q. B. 208; *The Teutonia* (1872), L. R. 4 P. C. 171; *Haines* v. *Bush* (1814), 1 Marshall, 191.

(*g*) *Heslop* v. *Jones* (1787), 2 Chit. 550. See also *Cunard* v. *Hyde* (1858), 27 L. J. Q. B. 408; and *Wilson* v. *Rankin* (1865), L. R. 1 Q. B. 162, in which the plaintiff was held to have no illegal intention, and *Cunard* v. *Hyde* (1859), 29 L. J. Q. B. 6, in which he was held guilty.

(*h*) *Esposito* v. *Bowden*, *vide supra*. See also *Avery* v. *Bowden*—*Reid* v. *Hoskins* (1856), 6 E. & B. 953.

(*i*) *Waugh* v. *Morris*, L. R. 8 Q. B. 202 (1873); see also *Cargo ex Argos* (1873), L. R. 5 P. C. 157, where illegality by French law, impossibility by English law, was met by the suggestion that the charterer might unload "alongside," and so act legally. The illegality must be limited strictly in its operation. Thus, in *Storer* v. *Gordon* (1814), 3 M. & S. 308, where a ship was chartered to deliver an outward cargo on payment of freight, and carry home cargo, the seizure of the outward cargo by the government before delivery was held to absolve the charterer from payment of freight, but not from the liability to load a return cargo. Seizure by revenue officers will be *primâ facie* proof of illegality of voyage, without proving actual condemnation: *Blanck* v. *Solly* (1818), 1 Moore, 531.

Case 3.—A Prussian ship was chartered to call at an English port for orders "to proceed to any safe port in Great Britain or on the continent between Havre and Hamburg." She received orders at Falmouth on July 11, to proceed to Dunkirk; on July 19, before she had reached Dunkirk, war broke out between France and Prussia. *Held*, that the contract was not dissolved, as the charterer could name some safe port within the charter limits, not being French, at which the charter could legally be performed (*k*).

Article 5.—*Effects of Blockade.*

A charter, the performance of which requires the running of a foreign blockade, is not illegal by the municipal law of England, though both parties knew of the blockade when the charter was entered into (*l*). The only effect of such knowledge will be to prevent the delay caused by the blockade from putting an end to the charter (*m*).

Running a blockade, by international law, involves the confiscation of the ship if captured on the out or home voyage, and of the cargo, if its owners knew or might have known of the blockade when they entered into the contract of carriage (*n*).

Case.—To an action on a charter, defendants pleaded that "it was entered into for the purpose of running the blockade of the southern ports of the United States." *Held*, no answer in law (*o*).

Article 6.—*Construction of the Contract: On what Principle.*

The construction to be given to charters and bills of lading is not an unnecessarily strict one, but such a one as with reference to the context and the object of the contract will

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(*k*) *The Teutonia* (1872), L. R. 4 P. C. 171.

(*l*) *The Helen* (1865), L. R. 1 Adm. 1; *Medeiros* v. *Hill* (1832), 8 Bing. 231; *Moorsom* v. *Greaves* (1811), 2 Camp. 626; *Naylor* v. *Taylor* (1828), M. & M. 205.

(*m*) See Article 30, *post*; and see, as to contraband cargo, *Ex parte Chavasse*, 11 Jur. N. S. 400 (1865).

(*n*) *The Mercurius* (1798), 1 Rob. 80; *The Alexander* (1801), 4 Rob. 93; *The Admis* (1804), 5 Rob. 256, 259; *The Exchange* (1808), 1 Edw. 39, 42; *The James Cook* (1810), 1 Edw. 261; *Baltazzi* v. *Ryder* (1858), 12 Moore, P. C. 168. The headnote to the latter case is not justified by the report, so far as it contradicts the text, and its last two propositions, without qualification, contradict each other.

(*o*) *The Helen*, *vide supra*.

best effectuate the obvious and expressed intent of the parties (*p*).

The construction of a charter or bill of lading is for the Court, unless there is mutual (*q*) mistake of the parties, ambiguity, or some peculiar meaning attached to the words of the document by reason of the custom of the trade or port to which the document relates. In these cases the presence of the mistake or the meaning of the words will be a question for the jury, and oral evidence will be admissible to assist their decision; whether there is any ground for the admission of oral evidence on these points (*r*), a question for the Court (*s*).

Note.—The remarks of Lord Esher, M.R., in *Stewart* v. *Merchants' Marine Insurance Co.* (*y*) are in point: "Ought we in the case of an instrument like an English charter, to apply the rules of construction which are applicable to other instruments? Anything more informal, inartistic or ungrammatical cannot be found, and, until recently, whenever a point arose as to their meaning, our judges almost invariably took the opinion of a jury on the question. . . . . I protest against the attempt to construe these documents by the rules of construction applicable to other instruments, and when they are construed without the assistance of a jury, I think the proper way is to construe them with the aid of our knowledge of business, and to take it for granted that merchants have acted in a business-like way." One rule of construction at any rate may be applied, viz., that exceptions or clauses introduced in favour of one party to the contract are to be construed most strictly against him: (See per Bowen, L.J., in *Burton* v. *English*) (*z*).

Case.—A ship was chartered to proceed to X., a river port, and there load, "the master guaranteeing to carry 3000 tons dead weight of cargo, upon a draught of twenty-six feet of water." The ship could carry such a cargo, at such a draught in salt, but not in fresh, water. *Held*, that as the charter shewed that both parties contemplated loading in a river, the guarantee must be applied to both fresh and salt water (*a*).

(*p*) *Dimech* v. *Corlett* (1858), 12 Moore P. C. at p. 224; So, *per* Brett, M.R., in *Sailing Ship Garston* v. *Hickie* (1885), 15 Q. B. D. 580. "The term 'port' is to be taken in its business, popular, or commercial sense, and not in its legal definition for revenue or pilotage purposes."

(*q*) *Dixon* v. *Heriot* (1862), 2 F. & F. 760.

(*r*) As to variation of charters by parol evidence, see *Thomson* v. *Brown* (1817), 7 Taunt. 656; *White* v. *Parker* (1810), 12 East, 578.

(*s*) *Bowes* v. *Shand* (1877), L. R. 2 App. C. 455, 462; *Ashforth* v. *Redford* (1873), L. R. 9 C. P. 20. As to evidence of usage, see Article 8.

(*y*) (1885), 16 Q. B. D. at p. 627.

(*z*) (1883), 12 Q. B. D. at p. 222.

(*a*) *The Norway* (1865) 3 Moore, P. C., N. S. 245.

Article 7.—Construction of the Contract.—By what Law.

The construction of charterparties and bills of lading must be governed by the law by which it appears from all the circumstances that the parties intended to be bound (*b*).

In the absence of any express indication of intention as between the parties to a contract of affreightment, the law of the ship's flag should govern its construction (*c*).

Whoever puts his goods on board a foreign ship to be carried authorizes the master to deal with them according to the law of the ship's flag, unless that authority is limited by express stipulation between the parties at the time of the agreement (*d*).

Case 1.—C., a British subject, chartered a French ship at a Danish port for a voyage from Hayti to France or England at charterer's option. The master in a Portuguese port gave a bottomry bond, binding ship, freight, and cargo. C. as cargo-owner, having to pay under the bond, called upon the shipowner to indemnify him. The shipowner abandoned the ship and freight to him. This was a good defence at French, but not at English law. *Held*, that the French law, being the law of the ship's flag, governed the relations of the parties to the charter (*e*).

Case 2.—C., domiciled in England, shipped goods under a charter made in London on an Italian ship bound for England. The master in a Portuguese port gave a bottomry bond on ship, cargo, and freight. He did not communicate with his owners, but could have done so. By English law communication under such circumstances was necessary; by Italian law it was unnecessary. *Held*, that the powers of the master to deal with the goods were governed by Italian law, being the law of the ship's flag (*f*).

Case 3.—A German ship, with German master, was chartered by German charterers from Russia to England. Charterparty and bill of lading were in English. *Held*, the German law must govern the interpretation of the documents (*g*).

Case 4.—A passenger with luggage shipped on an English vessel, on a voyage from England for France under a ticket bought in England. The luggage was lost; the ticket under English law freed the ship from liability; the French law would render the ship liable in spite of the ticket. *Held*, that the English law must prevail, being both the law of the flag, and

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(*b*) *Chartered Bank* v. *Netherlands Company* (1883), 10 Q. B. D. 521, 529, 540; *Jacobs & Co.* v. *Credit Lyonnais* (1884), 12 Q. B. D. 589.

(*c*) *Lloyd* v. *Guibert* (1865), L. R. 1 Q. B. 115; *The Gaetano e Maria* (1882), 7 L. R. P. D. 1, 137 (C.A.) at p. 147; *The Bahia* (1864), B. & L. 292, 301.

(*d*) *The Gaetano e Maria, supra, per* Brett, L.J., pp. 147, 148; *per* Cotton, L.J., p. 149; *The Karnak* (1869), L. R. 2 P. C. 505.

(*e*) *Lloyd* v. *Guibert* (1865), L. R. 1 Q. B. 115.

(*f*) *The Gaetano e Maria* (1882), L. R. 7 P. D. 1, 137.

(*g*) *The Express* (1872), L. R. 3 Adm. 597.

the *lex loci contractus*, and being also necessary to give some meaning to conditions in the ticket which would be invalid by French law (*h*).

Case 5.—E., an English merchant, shipped goods in an English port to be carried to a Dutch port in a ship registered in Holland, and carrying the Dutch flag, belonging to a company registered in Holland, and also registered in England as an English joint stock company. The bill of lading was in the English language and form, and described the company as a "limited company." *Held*, that the intention of the parties was that the contract should be governed by English law, thus setting aside the *primâ facie* application of the "law of the flag" (*i*).

Note.—This article, it is submitted, accurately represents the law at the present day, and in view of it the cases of *The Hamburg*, *Duranty* v. *Hart* (*k*); *The San Roman* (*l*); and *The Wilhelm Schmidt* (*m*), so far as they set up another standard of construction than the law of the flag, are of very doubtful authority.

In *The Hamburg* (1864), a bottomy bond payable in England was given at St. Thomas by the master of the *S.* of Hamburg, chartered from Nicaragua to England. In an action on the bond, Dr. Lushington said: "I shall govern my judgment by the ordinary maritime law," and, after referring to *The Gratitudine* (*n*), in which he noted that Lord Stowell had not suggested that any other law should be applied, and to *The Bonaparte* (*o*), he continued: "In this case therefore and for the present, I must take as my guide the ordinary maritime law. The state of the pleadings also is so vague, and the evidence so loose and unsatisfactory that I can take no other course. Whenever any specific law is averred to be the governing law with sufficient distinctness, and proper evidence produced, I shall be ready to consider the question." On appeal, the Judicial Committee simply say. "We entirely agree with the learned judge that the case is to be decided by the general maritime law as administered in England." In this case the bondholder had pleaded the law of Hamburg and other laws, but there was some conflict as to what the law of Hamburg really was.

Lloyd v. *Guibert* (*p*) was decided the following year (1865),

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(*h*) *P. & O. Company* v. *Shand* (1865), 3 Moore, P. C., N. S. 272. See also *Moore* v. *Harris* (1876) L. R., 1 App. C. 318, where also the law of the flag, and the *lex loci contractus* were the same. It is not possible to lay down any fixed rule as to the *lex loci contractus* from these two cases; particularly as in *Lloyd* v. *Guibert*, *vide supra*, Willes, J., took the case of bills of lading in foreign ports, such as Alexandria, as showing the absurdity of the *lex loci contractus* as a general rule. The intention of the parties is the criterion, with a strong presumption in favour of the law of the flag.

(*i*) *Chartered Bank* v. *Netherlands India Steam Company* (1883), 10 Q. B. D. 521.

(*k*) (1864), B. & L. 253, 260, 272.

(*l*) (1872), L. R. 3 Adm. 583; L.R. 5 P. C. 301.

(*m*) (1871), 25 L. T. 34; 1 Asp. Mar. C. 82.

(*n*) (1801), 3 C. Rob. 240.

(*o*) (1853), 8 Moore P. C. 459.

(*p*) (1865), L. R. 1 Q. B. 115, 125.

and Willes, J., delivering the judgment of the Court of Exchequer Chamber, distinguished *The Hamburg* in this ingenious way. "*The Hamburg* was cited as an authority, and at first sight it appeared to be one, for applying English law to the present case, but upon consideration it appears altogether distinguishable. The alleged agency of the master in that case was founded upon necessity alone, and it was incumbent upon the bondholder to establish such necessity by evidence, and in order to do that he was bound . . . . to shew a communication with the owners of the cargo, that being, as the Court held, reasonably practicable. So that the *lex fori* was undoubtedly supreme upon the question which then arose, it being one of evidence and procedure" (p. 124). This distinction seems very unsatisfactory, for to hold that the proposition: "A master cannot hypothecate without previous communication with his owners, if such be practicable" may be put in this form: "To prove in an English Court necessity entitling a master to hypothecate without consulting his owners, you must prove that he could not communicate with his owners;" and is therefore merely a question of mode of proof, to be determined by the *lex fori*, is a curious destruction of a legal principle and turns the legal definition of "necessity" into a question of procedure. And in spite of the distinction subsequent judges declined to accept the two cases as reconcileable (*q*).

In the case of *The Karnak* (*r*) in 1869, while the main question was as to the necessity of hypothecation, the Judicial Committee, without referring to *The Hamburg*, expressly adopted the principle of *Lloyd* v. *Guibert*, that "the captain's authority to hypothecate was derived from and bounded by the municipal law of the country to which the ship belongs—that is by the law of the flag."

In 1871, in *The Patria* (*s*), Sir R. Phillimore expressed a preference for *The Hamburg* over *Lloyd* v. *Guibert*, and for the "general maritime law," but the point was not necessary to the decision. In *The Wilhelm Schmidt* (*t*), in the same year, the master of a German ship had entered into a charter with German subjects at Constantinople, to carry a cargo to a port in England for orders, thence to a port in England or on the continent. The charter and bill of lading were in the English language, and the ship was ordered to discharge in England. Questions arose as to liability for delay through fear of capture, and Sir R. Phillimore held that the general character of the charter, and the fact that England was the ultimate place of performance, showed that the charter should be construed by the English law,

(*q*) The reasoning of Cotton, L.J., in *The Gaetano and Maria* (1882), L. R. 7 P. D. at p. 149, also neatly exposes the fallacy of the distinction.
(*r*) (1869), L. R. 2 A. & E. 289; 2 P. C. 505.
(*s*) (1871), L. R. 3 A. & E. 436.
(*t*) 25 L. T. 34.

but his judgment in favour of the plaintiff concluded by saying that the German law was even more favourable to him than the English law, so the point as to which law should prevail was not vital in the case.

In *The San Roman* (*u*) in 1872, a German ship was chartered by Englishmen, the charter being executed in London and Hamburg, the port of call for orders and port fixed for delivery being in England. Sir R. Phillimore said: "The question as to the reasonableness of the delay with reference to apprehension of capture seems to me . . . to be properly governed by the law of the place of performance (*i.e.* England) . . . It has been argued that these opinions conflict with the decision in *Lloyd* v. *Guibert*. It is not necessary to decide this point, or whether the case of *Lloyd* v. *Guibert* be reconcilable with the decision of the Privy Council in *The Hamburg*, because upon this question of the reasonableness of delay there is really no substantial difference between the law of England and Germany." And the Privy Council say: "It is unnecessary to determine whether this case ought to be decided according to the law of England or Germany, because there is no practical distinction on the subject in the law of the two countries."

It will be noted that in the last three cases Sir R. Phillimore expressed his preference for *The Hamburg* over *Lloyd* v. *Guibert*; but it is submitted that the result of the recent decision in the Court of Appeal in the *The Gaetano e Maria* (*v*) is to cast great doubt on the decision in *The Hamburg*, to support and widen *Lloyd* v. *Guibert*, and to render the decisions in *The San Roman* and *The Wilhelm Schmidt*, untrustworthy authorities. In the two last cases we have decisions of Sir R. Phillimore to the effect that delay in the delivery of a cargo through fear of capture is a matter to be dealt with by the law of the place of performance, as to which he declines to decide whether it is or is not inconsistent with *Lloyd* v. *Guibert*, or whether the latter case is not inconsistent with *The Hamburg;* while in each case the alternative laws of construction were identical in their provisions, and whichever was adopted the immediate result was the same. But in *The Gaetano e Maria*, Brett and Cotton, L.JJ., after considering both *The Hamburg* and *Lloyd* v. *Guibert*, reverse the judgment of Sir R. Phillimore, which was expressly based on *The Hamburg*, and in terms lay down that (*w*), "acting upon the principles of *Lloyd* v. *Guibert*, and upon the principle which arises from the mercantile transaction itself, the man who puts his goods on board a foreign ship authorizes the owner of that vessel, and his agent, the captain, to deal with those goods according to the law of the country to which that vessel belongs." Now the delay in delivery from fear of capture which existed

(*u*) L. R. 3 Adm. 583, 593; L. R. 5 P. C. 301, 305.
(*v*) L. R. 7 P. D. 1, 137 (1882).
(*w*) *Ibid.* pp. 148, 149.

in *The San Roman* and *The Wilhelm Schmidt*, was clearly a dealing of the captain with the goods, and should therefore, on the authority of the Court of Appeal, be dealt with according to the law of the flag, in the absence of any express evidence of contrary intention of the parties, and not according to the law of the place of performance.

Similarly the case of *The Hamburg* was treated by the Court as inconclusive, Brett, L.J., saying that it resulted from failure to give evidence that the ship was a foreign ship, and under a law different from the English. "I cannot, therefore," continued the Lord Justice, "think that *The Hamburg* is in conflict with the present case, or with the case of *Lloyd* v. *Guibert*;" and Cotton, L.J., took the same view. Without discussing whether this was really the result of *The Hamburg*, it is quite clear that the authority of that case, as deciding that the validity of a bottomry bond on, or the construction of a charter of, a foreign ship bound for England, is to be decided, in the absence of express evidence of a contrary intention, by English law, as the law of the place of performance, is gone, as far as the Court of Appeal is concerned.

While the Court put *Lloyd* v. *Guibert* on a different footing from the case it was then deciding, saying that *Lloyd* v. *Guibert* was a case of construction of a charter, and *The Gaetano e Maria* a question of the master's authority arising from the shipment of goods on board a foreign ship, they yet distinctly approve and act upon the principle of *Lloyd* v. *Guibert*, that in the absence of contrary intention shown, the construction of the charter of a foreign ship, and the incidents arising thereunder are to be decided by the law of the ship's flag.

It is therefore submitted that Article 7 represents the existing law, and that the cases of *The Hamburg*, *The San Roman*, and *The Wilhelm Schmidt*, cannot be considered as trustworthy authorities for anything at variance with that article.

Article 8.—*Evidence of Usage, when Admissible.*

A charter is so far conclusive as to the terms of the contract expressed in it, that what is not in the charter cannot be part of the terms.

To this there is an exception that customs of trade are tacitly incorporated in the contract, though not expressed in it (*x*), on the ground that the parties to the contract must

(*x*) *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802, at p. 811, *per* Blackburn, J. See also Brett, J., at p. 819, and Lord Chelmsford, p. 836. On the nature of a "custom of trade," see *per* Willes, J., in *Meyer* v. *Dresser* (1864), 16 C. B., N. S. at p. 662.

be presumed to have contracted with reference to such customs (*y*).

Customs of trade may control the mode of performance of a contract, but cannot change its intrinsic character (*z*). Thus if the express terms of the charter are inconsistent with the alleged usage, evidence of the usage will not be admissible (*a*).

Evidence of usage is therefore admissible to explain ambiguous (*b*) mercantile expressions in a charter, or to add incidents, or to annex usual terms and conditions which are not inconsistent with the written contract between the parties, but not for any further purpose (*c*).

It is still more admissible to explain the contract of which a bill of lading is evidence, as the bill of lading is not the contract, but only evidence of the contract (*d*).

Usages or customs to be enforced by the Courts must be, 1. reasonable; 2. certain; 3. consistent with the contract; 4. universally acquiesced in; 5. not contrary to law.

Note.—The nature of a binding custom has been thus illustrated: "In order that the shippers should be taken to have impliedly given leave to stow the goods on deck, the shipowners must prove a practice so general and universal in the trade, and in the particular port from which the goods were taken, that everyone shipping goods there must be taken to know that other people's goods, if not his goods, might probably be stowed on deck" (*e*).

I. Cases in which evidence of usage has been held admissible.

Case 1.—Charter between A. and C., a foreigner, from Riga to Liverpool, containing clauses: "the steamer to be discharged in ten working days. Discharging dock to be ordered on arrival at Liverpool." Evidence was tendered of a custom of the port of Liverpool, that in the case of timber ships lay-days commenced on the mooring of the ship at the quay where

(*y*) *Kirchner* v. *Venus* (1859), 12 Moore, P. C. 361, 399.

(*z*) *Mollett* v. *Robinson* (1870), L. R. 5 C. P. 656, *per* Willes, J., see also L. R. 7 H. L. at p. 836.

(*a*) See footnote, *ante*, p. 15.

(*b*) E. g. "freight," which is a well-understood term in a contract, cannot be explained by usage; *Krall* v. *Burnett* (1877), 25 W. R. 305; though its method of payment, which varies in each port, can: *Brown* v. *Byrne* (1854), 3 E. & B. 702; *Falkner* v. *Earle* (1863), 3 B. &. S. 360; *The Norway* (1865), 3 Moore P. C., N. S. 245.

(*c*) *Robinson* v. *Mollett* (1875), L. R. 7 H. L., pp. 802, 815, *per* Mellor, J.

(*d*) See *Andrew* v. *Moorhouse* (1814), 5 Taunton, 435.

(*e*) *Newall* v. *Royal Exchange Shipping Co.* (1885), 33 W. R. 342, 868, at p. 869.

she was to discharge. *Held admissible*, as explaining the meaning of "arrival at Liverpool"; inadmissible, if its effect was to vary or add to the terms of the charter, unless it was proved to have been known to both parties (*f*).

Case 2.—D. entered into a charter with A. "as agents for merchants," and signed it "as agents for merchants." Evidence was tendered of a custom that if D.'s principal were not disclosed within a reasonable time, D. was personally liable. *Held admissible*, as not inconsistent or irreconcileable with the written contract, but as adding in a certain contingency a collateral provision for liability. *Semble*, *per* Brett, J., that evidence that D. was from the first liable as principal, would not be admissible as contradicting the contract (*g*).

Case 3.—A charter was made "on condition of the ship's taking a cargo of not less than 1000 tons of weight and measurement." *Held*, that the proportions of weight and measurement tonnage were to be ascertained by oral evidence of the usage of the port of loading (*h*).

Case 4.—A ship was chartered "to proceed to a port in the Bristol Channel, or so near thereto as she may safely get at all times of tide and always afloat, and deliver the same, eight running days to be allowed for discharging the cargo." The ship was ordered to Z., and entered the port of Z.: a custom of the port of Z. was proved that vessels too heavily laden to proceed in the port beyond Y., were lightened at Y., and proceeded by canal to Z. and there finished unloading; and that the times of unloading at Y and Z. counted in the lay-days, but not the time spent in proceeding along the canal. *Held admissible*, as not inconsistent with the charter (*i*).

Case 5.—Wool was shipped from Odessa under a bill of lading, "freight to be paid in London on delivery at 80s. per ton, gross weight, tallow, grain or seed in proportion as per London Baltic printed rates." *Held*, that evidence of the customs of the Russian trade was admissible to explain this bill of lading, though the defendant, the consignee under it, was wholly unconnected with the Russian trade (*j*).

Case 6.—A bill of lading stated that goods shipped at X. were deliverable at Z., "he or they paying freight for the said goods, five-eighths of a penny per pound—with 5 per cent. primage and average accustomed." *Held*, that evidence of a custom of Z. to deduct three months' discount on freights on goods from X. was admissible (*k*).

Note.—In general, therefore, the term "loading" will be construed by the usages of the port of loading (*l*), "discharge" by the usages of the port of discharge (*m*), the method of pay-

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(*f*) *S. S. Norden* v. *Dempsey* (1876), L. R., 1 C. P. D. 654, and see note, *post*, p. 19.

(*g*) *Hutchinson* v. *Tatham* (1873), L. R. 8 C. P. 482.

(*h*) *Pust* v. *Dowie* (1864), 5 B. & S. 20.

(*i*) *Nielsen* v. *Wait* (1885), 14 Q. B. D. 516; 16 Q. B. D. 67 (C. A.)

(*j*) *Russian Steam Navigation Company* v. *De Silva* (1863), 13 C. B., N. S. 610.

(*k*) *Brown* v. *Byrne* (1854), 3 E. & B. 702. See also *Falkner* v. *Earle* (1863), 3 B. & S. 360; and *The Norway* (1865), 3 Moore, P. C., N. S. 246, and compare case 7, *sub.*

(*l*) *E. g. The Skandinav* (1881), 51 L. J. P. 93; *Fullagsen* v. *Walford* (1883), 1 C. & E. 198; *Cuthbert* v. *Cumming* (1855), 11 Ex. 405; *Leidemann* v. *Schultz* (1853), 14 C. B. 38; *Lawson* v. *Burness* (1862), 1 H. & C. 396.

(*m*) *Marzetti* v. *Smith* (1883), 49 L. T. 580; *Petrococchino* v. *Bott* (1874), L. R. 9 C. P. 355; *Aste* v. *Stumore* (1884), 1 C. & E. 319.

ment of freight by the usages of the port where freight is payable (*n*). This is done on the principle that "where the performance of a contract has reference to a particular trade, the party contracting is necessarily obliged to make himself acquainted, by due inquiry, with the usages of that trade" (*o*).

II. Cases where evidence of usage has been held inadmissible.

Case 7.—A bill of lading contained the clause "freight payable in London." Evidence was tendered that this meant by the custom of the steam shipping trade "freight payable in advance in London." *Held inadmissible*, the word "freight" being unambiguous, and there being nothing in the context to qualify it (*p*).

Case 8.—A charter "to a safe port, or as near thereto as she can safely get, and always lay and discharge afloat." Evidence was tendered of a custom of the port of Z., to lighten ships outside the port, if they were laden too deep to enter the port, and then require them to proceed into port. *Held inadmissible*, as inconsistent with the contract, and as being a custom to apply to a contract where the ship was only bound to go into Z., something to be done before she got to Z. (*q*).

Case 9.—A charter to deliver "at Z., or so near thereto as the vessel could safely get." Evidence was tendered of a custom of the port of Z. by which the consignee was only bound to take delivery at Z. *Held inadmissible*, as inconsistent with the charter (*r*).

Case 10.—Evidence was tendered of a "universal custom" of merchants to deduct from the bill of lading freight, the value of goods which, though mentioned in the bill of lading, have never actually been put on board. *Held inadmissible*, as a mere mode of carrying on business and of settling accounts, and not a practice of merchants creating rights between the parties to the contract (*s*).

Case 11.—In an action by the indorsee of mate's receipts given at X., against an English captain for delivering goods laden at X. to indorsees of a bill of lading, evidence was offered of a custom at X., that mate's receipts are negotiable instruments, passing the property in the goods by indorsement without notice to the shipowner, and that the master is bound only to sign bills of lading on delivery of the mate's receipts, or if he has already signed bills of lading, should sign a second set for the holder of the mate's receipt, to whom alone he must deliver the goods. *Held*, unreasonable and not binding on captains or shipowners (*t*).

Case 12.—A charter required the freighter to pay "95*s.* per ton on goods shipped at X. for Z., cotton to be taken at fifty cubic feet per ton." Evidence was tendered of a custom at X., that the measurement before the goods were shipped should be accepted. *Held admissible*, but *displaced* by

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(*n*) Case 6, *ante*.

(*o*) *Per* Willes, J., in *Russian Co.* v. *De Silva* (1863), 13 C. B., N. S. 610, 617, and see cases and rules laid down in notes to *Wigglesworth* v. *Dallison*, 1 Smith, L. C., 8th ed., pp. 602–626.

(*p*) *Krall* v. *Burnett* (1877), 25 W. R. 305. See also *Lewis* v. *Marshall* (1844), 7 M. & G. 729, where evidence that "freight" included "passage money," was rejected; and *Cockburn* v. *Alexander* (1848), 6 C. B. 791.

(*q*) *The Alhambra* (C. A.) 1881, L. R. 6 P. D. 68.

(*r*) *Hayton* v. *Irwin* (1879), 5 C. P. D. 130.

(*s*) Per Willes, J., in *Meyer* v. *Dresser* (1864), 16 C. B., N. S. 646, 662.

(*t*) *Hathesing* v. *Laing* (1873), L. R. 17 Eq. 92.

proof of the objection of the captain to so receive them, of their measurement on board by the captain, and his delivery to the shippers of a note of his measurement (*u*).

Note.—The line between admissibility and rejection of evidence of custom is very difficult to draw, and some of the cases, notably *Hutchinson* v. *Tatham* (*x*), are hard to reconcile with any clear principle. In one sense the contract must always be varied by the admission of evidence of custom, inasmuch as the construction of the contract by the Court would not be the same without the parol evidence, or else such evidence would be unnecessary. The whole question has been fully discussed in *Robinson* v. *Mollet* (1875), L. R. 7 H. L. 802. Another difficulty arises from the apparent conflict between the *dicta* in *Kirchner* v. *Venus* (*y*) and *S. S. Norden* v. *Dempsey* (*z*) to the effect that customs do not bind one ignorant of them; and such cases as *Robertson* v. *Jackson* (*a*) and *Hudson* v. *Ede* (*b*), where customs of a port were held to bind persons ignorant of them. The explanation seems to be that, in the latter class of cases, custom is introduced to explain the meaning a word bears in the charter; *e.g.*, the parties are presumed to have meant by "loading," "loading as carried out at the port of loading," but what this is can only be construed by the customs of the port of loading. The fact that a person, who has contracted to "load" at a certain port, is ignorant of how "loading" is conducted at that port, cannot save him from being bound by the ordinary method of loading there. On the other hand, when, as in the former class of cases, something is sought to be added to the charter, beyond the language the parties have used, it may fairly be required that both parties be shewn to have known of this addition, and therefore to have contracted with regard to it.

Article 9.—Printed Forms of Contract.

Questions of mistake in the expression of intention frequently arise in the case of charters effected by filling in printed forms, where parts of the printed form, left in by inadvertence, are in direct contradiction to clauses written in the form (*c*): in these cases the written clause should usually

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(*u*) *Bottomley* v. *Forbes* (1838), 5 Bing. N. C. 121. See also *Buckle* v. *Knoop* (1867), L. R. 2 Ex. 125.

(*x*) *Vide supra*, case 2.

(*y*) (1859), 12 Moore, P. C. 361, 399.

(*z*) (1876), L. R. 1 C. P. D. at p. 662.

(*a*) (1845), 2 C. B. 412.

(*b*) (1868), L. R. 3 Q. B. 413.

(*c*) Curious charters result from the filling in of time charters on printed

prevail, as clearly expressing the intention of the parties (*d*). It is unnecessary to find a meaning in the particular charter for every word of a common printed form (*e*).

Case 1.—A charter contained a printed clause that cargo at Z. "should be brought to and taken from alongside at owner's risk and expense;" and a written one: "cargo at Z. as customary." The custom at Z. is that the ship pays for the lighterage. *Held*, that of these contradictory clauses the written one should prevail (as being obviously intended by the parties) (*f*).

Case 2.—A charter for outward voyage from X. only, on a printed form had a printed memorandum in the margin: "commission to be paid to C. to whom the vessel is to be addressed on her return to X." *Held*, that oral evidence was essential to shew that the memorandum was part of the contract (*g*).

Case 3.—A printed charter between A. and C. contained a clause in print: "the ship being now warranted tight and strong." No evidence of inadvertence in *both* parties as to this clause was given, and Erle, C.J., cautioned the jury against getting rid of a clause by oral evidence of misunderstanding (*h*).

Article 10.—*Alterations in Contract.*

An alteration, addition, or erasure in a charter after signature, made and assented to by one party only, voids the charter (*i*); mutual assent may effect such alteration (*k*).

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forms intended for voyage charters, and *vice versa*. A similar result in a policy of insurance puzzled the Courts in *Stewart* v. *Merchants' Insurance Co.* (1885), L. R. 16 Q. B. D. 627.

(*d*) *Scrutton* v. *Childs* (1877), 36 L. T. 212.

(*e*) Per Brett, J., and other Judges in *Gray* v. *Carr* (1871), L. R. 6 Q. B. 522, 536, 550, 557; *Pearson* v. *Goschen* (1864), 17 C. B., N. S. 353, 373, 376; but see *Maclean* v. *Fleming* (1871), 2 L. R. H. L. (Sc.) 128.

(*f*) *Scrutton* v. *Childs* (1877), 36 L. T. 212. See also *Alsager* v. *St. Kath. Docks* (1845), 14 M. & W. at p. 799: *Moore* v. *Harris* (1876), L. R. 1 App. C. 318, 327; where the written clauses required the ship to deliver to a railway and forward to Toronto, and there was a printed clause "goods to be taken from alongside by consignee immediately the vessel is ready to discharge, or otherwise they will be landed and stored at expense of consignee."

(*g*) *Hibbert* v. *Owen* (1859), 2 F. & F. 502.

(*h*) *Dixon* v. *Heriot* (1862), 2 F. & F. 760.

(*i*) *Crookewit* v. *Fletcher* (1857), 1 H. & N. 893, 912.

(*k*) *Hall* v. *Brown* (1814), 2 Dow, H. L. 367.

SECTION II.

Parties to the Contract.

Article 11.—*Who are Principals.*

Evidence to expressly contradict a statement in the charter as to the parties to it will not be admitted (*a*), in the absence of mutual mistake (*b*), or parol agreement between the parties (*c*). But where the charterparty contains a statement leaving it ambiguous whether a particular person was intended to be personally liable under it, or where a person who did not execute the charter denies that he ever gave any authority for its execution, parol evidence of the real contract between the parties or of whether there was any real contract will be admissible (*d*).

Case 1.—B. signed a charter as "owner of the good ship *Anne*": evidence was tendered to prove that he signed as agent for A., the real owner. *Held*, inadmissible to contradict the special description in the charterparty, or to allow A. to sue (*e*).

Case 2.—D. entered into a charter with A., as "D., agents for merchants," and signed himself "D., as agents for merchants." *Semble* (*per* Brett, J.), that evidence that D. from the beginning was held liable as principal was not admissible in face of the express statement in the contract (*f*).

Case 3.—In a printed charter between C. and A., the name of K., who was not a party to the charter, was by mistake left as charterer. To the plea that A. had not contracted with C., a reply that the intention was to make a contract between A. and C., but that K.'s name had been left in by mistake, was *held* good in law, without reforming the contract (*b*).

Case 4.—A charter with A. was signed by D., "For C. and Co., D. and Co. agents." In an action by A. against D., D. set up an express parol agreement between A. and D., that D.'s signature was only to be

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(*a*) *Humble* v. *Hunter* (1848), 12 Q. B. 310. See also *Lucas* v. *De la Cour* (1813), 1 M. & S. 249.

(*b*) *Breslauer* v. *Barwick* (1876), 36 L. T. 52.

(*c*) *Wake* v. *Harrop* (1862), 6 H. & N. 768; 1 H. & C. 202; *Cowie* v. *Witt* (1874), 23 W. R. 76.

(*d*) See *ante*, Article 6.

(*e*) *Humble* v. *Hunter* (1848), 12 Q. B. 310.

(*f*) *Hutchinson* v. *Tatham* (1873), L. R. 8 C. P. 482.

as agent, and was not to render him liable as principal. *Held*, a good defence (*g*).

Case 5. D. signed a charter with A. "for C. D. agent," and in an action against him by A., gave evidence that at the time of signing he told A. that he (D.) was not liable, but that C. was. A. admitted this, but said he remained silent, and did not assent. *Held*, evidence to go to the jury of express agreement that D. should not be liable, which would be a good defence (*h*).

Note.—This proposition is apparently contradicted by four cases (*k*). In *Schmaltz* v. *Avery* (*l*) C. had entered into a charter between "A., and C. & Co., agents of the freighter," and containing the clause: "this charter being concluded on behalf of another party, it is agreed that all responsibility on the part of C. & Co. shall cease as soon as the cargo is shipped." At the trial it was proved, no objection being taken to the evidence, that C. was the real freighter. The Court of Queen's Bench expressly noted that the evidence had not been objected to, and admitted that it, "strictly speaking, contradicted the charter, yet," they continued, "the defendant does not appear to be prejudiced; for, as he was regardless who the real freighter was, it should seem that he trusted for his freight to the lien on the cargo" (and not to the person of any particular freighter). "But there is no contradiction of the charter if the plaintiff can be considered as filling two characters, namely, those of agent and principal . . . he might contract as agent for the freighter, whoever that freighter might turn out to be, and might still adopt the character of freighter himself if he chose."

In *Carr* v. *Jackson* (*m*), where the charter was made between A. and D., but contained the clause, "this charter being concluded by D. on behalf of another party resident abroad," D.'s liability is to cease on his shipping the cargo. Parke, B., said, "the defendant would have been responsible for the freight of the goods if it had been shewn that he was the real principal in the matter; and the charter which professes to be entered into by him as agent, would not preclude such evidence being given."

In *Adams* v. *Hall* (*n*) B. entered into a charter as "B., for owners of the ship *S.*," and signed it "for owners, B." In the Court below three letters written by B. were admitted without objection to prove that B. was the owner of the *S.*, and the Divisional Court, noting the absence of objection to the evidence, said that the signatures to the charter were consistent

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(*g*) *Wake* v. *Harrop* (1862), 1 H. & C. 202.
(*h*) *Cowie* v. *Witt* (1874), 23 W. R. 76.
(*k*) *Jenkins* v. *Hutchinson* (1849), 13 Q. B. 744; *Schmaltz* v. *Avery* (1851), 16 Q. B. 655; *Carr* v. *Jackson* (1852), 7 Exch. 382; *Adams* v. *Hall* (1877), 37 L. T. 70.
(*l*) (1851), 16 Q. B. 655, 658, 663.
(*m*) (1852), 7 Exch. 382, 385.
(*n*) (1877) 37 L. T. 70.

with B.'s ownership, and that the letters did not contradict, but removed ambiguity in, the charter, and could therefore be used to explain the position of B.

In *Jenkins* v. *Hutchinson* (*o*) B. entered into a charter "between A. and C.," and signed it "B., pro A." A. had given B. no authority to make the charter, and did not adopt it. The Court held that "a party who executes an instrument in the name of another, whose name he puts to the instrument, and adds his own name as agent for that other, cannot be treated as a party to that instrument, and be sued upon it, *unless it be shewn that he was the real principal*" (which seems to imply that evidence for such a purpose was admissible).

In only one of these four cases, *Carr* v. *Jackson*, did the question of the admissibility of the evidence directly arise, and even there, as the evidence tendered was itself held insufficient, its admissibility or inadmissibility was not vital. In two of them (*p*) such evidence was admitted without objection in the Court below, and the higher Court had to deal with it as already admitted; and in the fourth case (*q*), the Court suggested that such evidence would have been admissible in a state of facts not before them. Moreover, in three out of the four cases (*r*), the evidence was admitted to prove that an agent professing to contract for an undisclosed principal, was himself that principal, and in *Jenkins* v. *Hutchinson* the Court suggested that the evidence might be admitted for that purpose; while in *Schmaltz* v. *Avery* the Court held that such a change of front, the agent declaring himself as the principal, who was before undisclosed, was not inconsistent with the ordinary terms of such charterparties.

But *Hutchinson* v. *Tatham* (*s*) was also a case of an agent contracting for an undisclosed principal. The agent was held to be personally liable, on a custom imposing such a liability, if the agent did not disclose his principal within a reasonable time; but in so deciding, Bovill, C.J., said, "Apart from the evidence of custom, it is quite clear that upon a contract framed as this is (*t*), the defendants could not be personally liable. It appears on the face of the contract they are contracting on behalf of somebody else"; and Brett, J., said, "it is clear that without evidence of custom the defendants would not be liable as principals. So strong do I consider the terms of the contract in this respect, taking the terms in the body and the signature together that *were evidence offered to shew that from the beginning the defendants were liable as principals, I should be prepared not to admit*

(*o*) (1849), 13 Q. B. 744, 752.
(*p*) *Schmaltz* v. *Avery*; *Adams* v. *Hall.*
(*q*) *Jenkins* v. *Hutchinson.*
(*r*) *Schmaltz* v. *Avery*; *Carr* v. *Jackson*; *Adams* v. *Hall.*
(*s*) (1873), L. R. 8 C. P. 482.
(*t*) *I.e.*, "as agents for merchants," both in the signature, and the body of the charter.

it" (*u*). This is clearly in direct conflict with the judgment of Park, B., in *Carr* v. *Jackson*.

It is submitted that such evidence is as a matter of principle not admissible, as directly contradicting the terms of a written document; and if admissible, it can only be on the grounds to the limited extent indicated in *Schmaltz* v. *Avery*, viz.:—

Where a man purports to contract as agent for an undisclosed principal, evidence is admissible to show that the agent himself is that undisclosed principal, such a double character of the agent not being inconsistent with the terms of the charter.

Yet this is contrary to the *dictum* of Brett, J., in *Hutchinson* v. *Tatham* (*x*), and must be further qualified by the reservation that:

D. entering into a charter as an agent, cannot disclose himself as principal if the other party relied on D.'s character as agent alone, and would not have contracted with D. as principal, had he known D. to be so (*y*).

Article 12.—*When an Agent binds his Principal.*

A person professing to act as agent will bind his alleged principal by a charterparty if that principal has:—

(1.) given him express authority to make such a con- contract.

(2.) placed him in a position of implied authority, or held him out as having such authority.

(3.) afterwards ratified the contract purporting to be made on his behalf.

Case.—On a charter signed "C. *per proc* of D.," it was proved that D. was allowed by C. to act as his general agent. *Held*, that C. was liable in the charter, though in making it, D. had exceeded C.'s special instructions (*z*).

(*u*) See also per *Cockburn, C.J.*, in *Fleet* v. *Murton* (1872), L. R. 7 Q. B. 126; *Hill, J.*, in *Deslandes* v. *Gregory* (1860), 2 E. & E. 602, 607.

(*x*) *Vide supra.*

(*y*) *Schmaltz* v. *Avery* (1851), 16 Q. B. 655, at p. 662.

(*z*) *Smith* v. *Maguire* (1858), 3 H. & N. 554.

Article 13.—*When Agent is personally liable as Principal.*

Whether or not a person, professing to have signed the charter as agent, can sue and be sued as principal, depends, apart from custom or express agreement, on the intention of the parties, to be gathered from the terms and signature of the charterparty, and the conduct of the parties in connection with the contract (*a*).

Where a person signs the charter in his own name without qualification, he is, *primâ facie*, deemed to contract personally, and, in order to prevent this liability from attaching, it must be clear from the other portions of the charterparty that he did not intend to bind himself as principal (*b*).

Note.—An agent wishing to protect himself from personal liability should state in the body of the charter that it is made by him as agent for the charterer or shipowner, and sign it "D., as agent for the charterer" (or shipowner). In this case, if no other clause in the charter shews an intention to make the agent personally liable, he cannot be sued on the charter; unless he does not disclose his principal, and a custom that an agent so failing to disclose is personally liable is proved to exist in that trade or port (*c*).

I. Cases where an agent has been held liable as principal (*d*).

Case 1.—Charter between A. and "D. on behalf of C.," afterwards referred to as "the parties": signed by A. and D. *Held*, D. was a party to the contract, and could sue and be sued under it (*e*).

Case 2.—Charter between C. and "B. for owners of the S.," signed "for owners, B." *Held*, ambiguous, but when construed with letters (not objected to), to render B. personally liable (*f*).

(*a*) A person may by his conduct have estopped himself from denying that he is personally liable: *Hermann* v. *Royal Exchange Shipping Co.* (1884), 1 C. & E. 413: where a well-known line put on to the berth an extra steamer, and were held by their conduct and the form of the bill of lading estopped from saying that they were not the parties contracting to carry.

(*b*) *Hough* v. *Manzanos* (1879), 4 Ex. D. 104.

(*c*) *Per* Bovill, C.J., and Brett, J., *Hutchinson* v. *Tatham* (1873), L. R. 8 C. P. 482. See also brokers' cases: *Fairlie* v. *Fenton* (1870), L. R. 5 Ex. 169; *Gadd* v. *Houghton* (1876), L. R. 1 Ex. D. 357 (C.A.); *Southwell* v. *Bowditch* (1876), L. R. 1 C. P. D. 100, 374 (C.A.)

(*d*) See also *Oglesby* v. *Yglesias* (1858), E. B. & E. 930; *Schmaltz* v. *Avery* (1851). 16 Q. B. 655; *Paice* v. *Walker* (1870), L. R. 5 Ex. 173, which has been doubted by James, L.J., in *Gadd* v. *Houghton* (1876), L. R. 1 Ex. D. 357; *Weidner* v. *Hoggett* (1876), 1 C. P. D. 533.

(*e*) *Cooke* v. *Wilson* (1856), 1 C. B., N. S. 153.

(*f*) *Adams* v. *Hall* (1877), 37 L. T. 70.

Case 3.—Charter between A. and "D., merchants"—"to load from factor of said merchants . . . thirty running days to be allowed said merchants"—signed "by authority of and as agents for C., of Memel, *pro* D." *Held*, D. was personally liable (*g*).

Case 4.—Charter between A. and "D., agent for C.," signed "D." *Held*, D. was personally liable (*h*).

Case 5.—Charter between A. and "D., as agents for charterers . . . ship to load from agents of said freighters (= D.) . . . captain to sign bills of lading at any freight required by charterers (= D.) . . . This charter being entered into on behalf of others, it is agreed that all liability of charterers (= D.) shall cease on completion of the loading." Signed "D." *Held*, D. was personally liable (*i*).

II. Cases where agent has been held *not* personally liable.

Case 6.—B. entered into a charter "between A. and C.," and signed it "B. pro A." A. had given B. no authority to make this contract, and did not adopt it. *Held*, that B., who had executed the charter in the name of another, and added his own name only as agent for that other, could not be treated as a party to the charter and sued upon it, (*quære*, unless it could be shewn he was the real principal (*j*)).

Case 7.—Charter between A. and "D., as agents to C., merchant and charterer." Signed "for C., D. as agent; for A., B. as agent." *Held*, that D. was not personally liable, upon a contract which both in its body and its signature was expressed to be made by him "as agent" (*k*).

Case 8.—Charter between "B., acting for owners of the ship," and C.: "B. undertakes to pay demurrage on barges." *Held*, by Bramwell, L.J., that B. was not personally liable (*l*).

Case 9.—Charter between A. and "D., as agents for merchants." Signed "D., as agents for merchants." *Held*, that, apart from custom, D. would not be personally liable (*m*).

Note.—An ingenious point has been taken with varying success, where an agent has been held personally liable on charters which also contain a cesser clause, *i.e.*, "this charter being entered into on behalf of others, it is agreed that all liability of agents shall cease on shipping of the cargo," or words to that effect. In *Oglesby* v. *Yglesias* (*n*) it was held by Erle and Crompton, JJ., that the agent, though personally liable on the charter, was freed by such a clause from all liability after ship-

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(*g*) *Lennard* v. *Robinson* (1885), 5 E. & B. 125.

(*h*) *Parker* v. *Winlow* (1857), 7 E. & B. 942.

(*i*) *Hough* v. *Manzanos* (1879), L. R. 4 Ex. D. 104.

(*j*) *Jenkins* v. *Hutchinson* (1849), 13 Q. B. 744. *Vide ante*, note to Article 11, pp. 22–24.

(*k*) *Deslandes* v. *Gregory* (1860), 2 E. & E. 602, but in *Hough* v. *Manzanos* (1879), L. R. 4 Ex. D. 104, Pollock, B., held that the words "*as agents for charterers*" in the body of the agreement are ambiguous. See, however, *Hutchinson* v. *Tatham*, *vide supra*.

(*l*) *Wagstaff* v. *Anderson* (1880), L. R. 5 C. P. D. 171. Judgment proceeded partly on the ground that "shipbrokers do not usually act for themselves."

(*m*) See note (*c*) *ante*, p. 25.

(*n*) (1858), E. B. & E. 930.

ping of cargo. On the other hand, in *Schmaltz* v. *Avery* (*o*), Patteson, J., delivering the judgment of the Court, said: "There is nothing in the argument that the plaintiff's responsibility is expressly made to cease 'as soon as the cargo is shipped,' for that limitation plainly applies only to his character as agent, and being real principal, his responsibility would unquestionably continue after the cargo was shipped."

Of these contradictory decisions that in *Oglesby* v. *Yglesias* (*p*) seems the more consistent with principle. If the plaintiffs relied on the defendant's character as principal, then with their eyes open they have agreed to the insertion of a clause directly limiting his liabilities, and the erroneous recital that he acts for another will not affect the question. And this is not inconsistent with the recent case of *Gullichsen* v. *Stewart* (*q*); for there, though persons, exempted from liability after loading by a cesser clause, were yet held liable for freight, it was on the subsequent contract in the bill of lading; on the charter alone they would, it is submitted, have been exempt. *Barwick* v. *Burnyeat* (*r*) even exempts them on charter and bill of lading together, but is, it is submitted, wrong.

Article 14.—*Agent for Undisclosed Principal.*

Where an agent contracts for an undisclosed principal, evidence of a custom that the agent is personally liable, if he does not disclose his principal within a reasonable time, is admissible.

Case.—D. entered into a charter with A., "as agents for merchants," and signed it, "as agents for merchants." *Held*, that evidence of a custom that if D. did not disclose to A. within a reasonable time the name of such merchants, D. was personally liable on the charter, was admissible (*s*).

Article 15.—*Agent for Crown.*

Agents chartering on behalf of the Crown are not personally liable (*t*).

(*o*) (1851), 16 Q. B. 655, 663.
(*p*) 1858, E. B. & E. 930.
(*q*) (1884), 13 Q. B. D. 317.
(*r*) (1877), 36 L. T. 250. *Vide sub.* Article 18, note p. 35.
(*s*) *Hutchinson* v. *Tatham* (1873), L. R. 8 C. P. 482. On this custom see also *Dale* v. *Humfrey* (1858), E. B. & E. 1004; *Fleet* v. *Murton* (1871), L. R. 7 Q. B. 126; *Southwell* v. *Bowditch* (1876), L. R. 1 C. P. D. 100, 374.
(*t*) *McBeath* v. *Haldimand* (1786), 1 T. R. 172; *Unwin* v. *Wolseley* (1787), 1 T. R. 674; *Gidley* v. *Lord Palmerston* (1822), 3 B. & B. 275. In exceptional

Article 16.—*Classes of Agents.*

Agents who may have authority on behalf of the shipowner to effect charters, sign bills of lading, or do ship's business generally, are:

(a.) The managing owner.
(b.) Brokers.
(c.) The Captain.

(a.) *Managing Owner.*

The managing owner is an agent appointed by the other owners to do what is necessary to enable the ship to prosecute her voyage and earn freight (*u*).

He binds by his action those of his co-owners, who have appointed him or expressly assented to his appointment, or held him out as having authority, and no others (*v*).

The fact that any person is registered as "managing owner" is not conclusive that he has authority to bind his co-owners, but may be displaced by evidence of absence of authority (*w*).

In the absence of express instructions, he has the power to procure a charter, and make the contracts necessary to carry it out. He has no power, in the absence of such instructions, to vary or cancel a charter, still less to agree on behalf of his owners to pay money for such cancellation (*x*). He cannot

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cases the agent may by the form of the charter expressly make himself liable, as in *Cunningham* v. *Collier* (1785), 4 Douglas, 233, where Lord Mansfield held such an agent liable.

(*u*) *Barker* v. *Highley* (1863), 15 C. B., N. S. 27, 34; *Thomas* v. *Lewis* (1878), L. R. 4 Ex. D. 18, 23. He used to be called "ship's husband." The ship's husband now is usually only a servant of the shipowner who undertakes the special duty of looking after the ship's equipment and outfit. In the case of the limited companies (single ship companies), by which many steamships and sailing vessels are now owned, the articles of association provide for the appointment and powers of the "managing owner," and shareholders in them will be bound by the articles. By 39 & 40 Vict. c. 80, s. 36 (1876), the name and address of the managing owner of every British ship, or of the ship's husband, or person to whom the management of the ship is entrusted by the owner must be registered at the custom house of the ship's port of registry. (See Appendix III.)

(*v*) *Frazer* v. *Cuthbertson* (1880), L. R. 6 Q. B. D. 93; *Barker* v. *Highley*, *vide supra*.

(*w*) *Frazer* v. *Cuthbertson*, *vide supra*.

(*x*) *Thomas* v. *Lewis*, *vide supra*.

against other partowners assign the whole freight to secure moneys advanced by him (*y*).

(b.) *Broker.*

A broker's authority to effect, vary, or rescind charters depends upon his special instructions at that particular time, and may be at any moment rescinded. A broker is often held out as having authority to engage goods for the vessels of a particular shipowner, and to receive the freight for such goods, in which case his engagements will bind the shipowner, and payment of freight to him will discharge the person paying; but such authority may be rescinded at any time, unless the special manner or time of rescinding it has been provided for by the agreement between the shipowner and broker.

A clause in a charter providing that the acting broker shall receive commission does not make him a party to the charter so as to be able to sue on it, but a party to the contract may sue for such commission as trustee for the broker (*z*).

Note.—The management of a vessel includes:—

I.—1. Decisions as to the employment of the ship.
2. Equipment and repairs of ship, and payment of accounts.
3. Engagement and discharge of crew.
4. Navigation loading and discharge of vessel.

II.—1. Chartering the vessel, or engagement of freight for her.
2. Collection of freight.
3. Entry and clearance of ship, and Customs business.

The first class of work is considered owner's work; the second, broker's work. But the same person may unite the functions of managing owner and broker; some owners do all their broker's work in their own office, and the exact division of the work varies with each shipowner.

Brokers who are not owners usually make one of the following branches of work their special business:

I.—*Brokers for the sale of ships.*

(*y*) *Guion* v. *Trask* (1860), 1 De G. F. & J. 373.

(*z*) *Nuova Rafaellina* v. *Japp* (1871), 3 L. R. Adm. 483; *Robertson* v. *Wait* (1853), 8 Ex. 299.

II. *Chartering brokers*, who find charters for ships, or ships for employment.

These two classes have no authority beyond their specific instructions in each particular case.

III.—*Loading brokers*, who habitually procure cargoes for vessels on the berth for a certain port or trade. Their connection with the merchants trading with such ports enables them to guarantee cargoes for vessels which they undertake to load, while to maintain that connection they must provide a fairly regular supply of vessels on that berth, by themselves chartering ships if necessary. They have power to make engagements to carry goods in the ship they load; they collect the freight on the engagements they have made, when such freight is payable at the port of loading; and they frequently supervise the stowage of the ship, though they do not accept responsibility to the shipowner for such stowage. They are paid as a rule by a percentage commission on the freight engaged. In certain trades, as the Australian, the chief loading brokers have formed a "ring," who in return for a merchant's promise to ship all his goods by the vessels loaded by the "ring" at an agreed rate, undertake to carry such goods at as low a rate as any vessel that may be put on the berth (*a*). All vessels on the berth which are not put in the hands of the "ring" to load, must be prepared to suffer severe competition. Some steam lines have specially appointed loading brokers, to whom application is made for room for goods to be shipped on any ship of the line, and to whom freight is paid. Their authority however is determinable by the shipowner, either on the terms of their appointment or at a moment's notice. On some lines all the loading broker's work is done in the managing owner's office.

Owner's work in foreign ports is done by the captain, or, in the case of vessels belonging to a regular line, by the branch house abroad, or by the captain, with the advice of the agents of the line, but the system of submarine cables has much lessened the captain's sphere of direct action abroad.

(c.) *Captain.*

In the absence of express authority from his owners, the captain's authority to bind them by a charter only arises when he is in a foreign port, when his owners are not there, and there is difficulty in communicating with them, and when the charter is a usual one in its terms (*b*).

(*a*) For an example of the working of such a "ring," see the facts in *Mogul S. S. Co.* v. *Macgregor* (1885), 15 Q. B. D. 476.

(*b*) Thus the captain has no right without instruction to execute a charter,

Before the arrival of his ship in port, no captain has any authority in law to bind his owners by letters written to an agent in port, asking him to make a charter for the ship before its arrival, and a charter so made would not be binding on the owners, unless subsequently ratified by them (*c*).

Semble, (*Per* Brett, L.J.), that a captain not having any authority to make such a contract cannot when in port ratify it, so as to bind his owners (*c*).

Where the captain is authorized to bind his owners, he will incidentally have the power to employ a broker or agent for this purpose (*d*).

Captains or agents at foreign ports have no authority to vary a charter, without express instructions from their principal (*e*), though they have authority to do all things necessary to perform the contract (*f*).

Article 17.—*Who are bound by Charters.*

(a.) *Part-owner of Shares in Ship.*

Any part-owner of a ship may object to its employment in any particular way, though such employment is under a charter made by a managing owner appointed by his co-owners, without objection on his part (*g*). In such a case that part-owner will neither share the profits, nor be liable for the losses, of such voyage, but will be entitled, in an action

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excluding the right of his owners to freight: *Walshe* v. *Provan* (1853), 8 Ex. at p. 850, *per* Pollock, C.B. See *Thomas* v. *Lewis*, L. R. 4 Ex. D. 18.

(*c*) *The Fanny*; *The Mathilda* (C.A.), (1883), 48 L. T. 771. The system of submarine cables has much lessened the captain's duties in foreign ports, the owners now settling the employment of their vessel by telegraph in most cases.

(*d*) *De Bussche* v. *Alt* (1878), L. R. 8 Ch. D. 286, 310. Story on Agency, par. 201.

(*e*) *Sickens* v. *Irving* (1859), 7 C. B., N. S. 165; *Burgen* v. *Sharpe* (1810), 2 Camp. 529. For a case when a charter was so varied, see *Hall* v. *Brown* (1814), 2 Dow, 367, 375; and for express authority in a charter to so vary, see *Wiggins* v. *Johnston* (1845), 14 M. & W. 609.

(*f*) The captain has authority to settle accounts to be paid for freight and demurrage in foreign parts, and to take bills of exchange for the amount, so as to bind the shipowner and a purchaser of the ship: *Alexander* v. *Dowie* (1857), 1 H. & N. 152.

(*g*) This will hardly apply to Single Ship Companies, which are governed by their articles of association.

of restraint, to a bond from his co-owners to secure the value of his share in the ship, before she will be allowed to sail on the chartered adventure (*h*).

(b.) *Purchaser.*

The purchaser or assignee of a ship under charter, or of any share therein, is bound by the charter in existence (*i*) but not for losses in charters which have expired (*k*).

(c.) *Mortgagor or Mortgagee.*

A mortgagor in possession has by statute (*l*) the powers of an ordinary owner, except that he must not materially impair the value of the mortgagee's security. The mortgagee out of possession is therefore bound by any charter which does not impair his security (*m*), and the burden of proving that a charter is of such a nature is on him (*n*).

He cannot object to a charter on the ground that its performance will involve the ship's leaving the jurisdiction, and so render the exercise of his rights more difficult (*n*); nor to an assignment of freight by the mortgagor as gross freight, the expenses of the voyage not being paid out of it (*o*); nor to a charter making freight payable to a third party (*p*).

(*h*) *The Talca* (1880), L. R. 5 P. D. 169. See also *Ouston* v. *Hebden* (1745), 1 Wils. 101; *Haly* v. *Goodson* (1816), 2 Mer. 77.

(*i*) *Messageries Co.* v. *Baines* (1863), 7 L. T. 763.

(*k*) *The Meredith* (1885), L. R. 10 P. D. 69.

(*l*) 17 & 18 Vict. c. 104, s. 70. A mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship or of any share thereof, nor shall the mortgagor be deemed to have ceased to be owner of such mortgaged ship or share, except in so far as may be necessary for making such ship available as a security for the mortgage debt.

(*m*) *Keith* v. *Burrows* (1877), L. R. 2 App. C. 636; *Collins* v. *Lamport* (1864), 34 L. J., N. S. Ch. 196; *The Fanchon* (1880), L. R. 5 P. D. 173; *De Mattos* v. *Gibson* (1858), 4 De G. & J. 276; *The Maxima* (1878), 39 L. T. 112; *Cory* v. *Stewart* (1886), Times, L. R. II. 508; *The Keroula* (1886), 55 L. J. Ad. 45; 11 P. D. 92.

(*n*) *The Fanchon, vide supra.*

(*o*) *The Edmond* (1860), Lush. 57.

(*p*) *Cory* v. *Stewart* (1886), *vide supra.* It is doubtful what dealings of the mortgagor will impair the mortgagee's security, *i.e.*, a freight-earning ship. Lord Esher, in *Cory* v. *Stewart, vide supra*, goes so far as to suggest that if the mortgagee considers the charter onerous, he should not enter into possession; but see *The Innisfallen* (1865), L. R. 1 Adm. 72; *The Keroula* (1886), L. R. 11 P. D. 92; 55 L. J. Adm. p. 45.

A mortgagee of shares out of possession cannot maintain an action of restraint.

Semble, that he can if in possession (*q*).

Article 18.—*Position of Shipper of Goods on a Chartered Ship.*

Where the ship carrying the goods in respect of which a bill of lading is given is under charter, the position of the holder of the bill of lading will vary according, as he is

(a.) Both shipper and charterer.

(b.) Shipper other than the charterer;—

(1) Ignorant of the charter.

(2) Knowing of the charter.

(c.) An indorsee from the shipper;—

(1) Ignorant of the charter.

(2) Aware of the charter.

It may also vary according to the powers conferred, by charter or otherwise, on the master or broker signing the bill of lading (*r*).

(a.) *Where the Shipper is also the Charterer.*

Where the charterer is himself the shipper, the contract of affreightment is contained, as between shipowner and charterer, in the charter and bill of lading combined (*s*).

If the holder of the bill of lading is merely an agent or factor of the charterer, he is in the same position as the charterer (*t*).

The fact that the bill of lading does not contain all the terms of the charter, will not therefore negative the presence of the omitted terms in the contract of affreightment (*s*).

(*q*) *The Innisfallen* (1866), L. R. 1 A. & E. 72; *The Keroula* (1886), 55 L. J. Ad. 45; 11 P. D. 92.

(*r*) See Article 20.

(*s*) *The San Roman* (1872), 3 L. R. Adm. 583, 592; *Gullichsen* v. *Stewart* (1884), 13 Q. B. D. 317; *Kern* v. *Deslandes* (1861), 10 C. B., N.S. 205; *Gledstanes* v. *Allen* (1852), 12 C. B. 202; *Small* v. *Moates* (1833), 9 Bing. 574.

(*t*) *Kern* v. *Deslandes*; *Small* v. *Moates*; *Gledstanes* v. *Allen*, *vide supra*.

If new terms or terms contradictory to the charter are contained in the bill of lading, they will form part of the contract if both parties intended them to be so (*u*), or if their agents signing the bill of lading had authority to make such variations or additions (*x*) but not otherwise (*y*).

Note.—If this is the law, Lord Bramwell's *dictum* in *Wagstaff* v. *Anderson* (*z*), repeated less decidedly in *Burdick* v. *Sewell* (*a*): "To say that the bill of lading is a contract superseding, adding to, or varying the former contract contained in the charter, is a proposition to which I never can consent;" must be taken as too wide. In *Gullichsen* v. *Stewart* (*b*) the Court of Appeal clearly allowed the bill of lading to impose upon the charterers a liability to pay demurrage at the port of discharge, from which the cesser clause in the charter had discharged them.

Case 1.—A ship was chartered, the charter containing a power to the master to sign bills of lading without prejudice to the charter, and exceptions *inter alia* of "restraint of princes." A shipper, who was practically identified with the charterer, and fully aware of the charter, obtained a bill of lading containing only an exception of perils of the seas. The ship was delayed by restraint of princes. *Held*, that the contract of affreightment was to be found in the charter and bill of lading, and that the one exception in the bill of lading did not supersede the several exceptions in the charter (*c*).

Case 2.—A ship was chartered with the usual stipulations for freight, demurrage, and a cesser clause. The charterers shipped the cargo themselves, accepting bills of lading, making the goods deliverable to themselves at the port of discharge, "they paying freight and all other conditions as per charter." In an action by shipowners against charterers as consignees under the bill of lading, for demurrage at the port of discharge: *Held*, they were liable, for the bill of lading only incorporated those clauses of the charter which were consistent with its character as a bill of lading, and did not therefore incorporate the "cesser clause" (*d*).

Note.—If instead of expressly incorporating some terms of the charter in the bill of lading, the owner had signed, and the charterers accepted a bill of lading, binding themselves to pay demurrage and freight, without any reference to the charter,

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(*u*) *Gullichsen* v. *Stewart*, *vide supra*; *Bryden* v. *Niebuhr* (1884), 1 C. & E. 241.

(*x*) See *post*, Article 20, on Master's and Broker's Authority; and *Rodoconachi* v. *Milburn* (1886), 17 Q. B. D. 316.

(*y*) *Caughey* v. *Gordon* (1878), L. R. 3 C. P. D. 419; *Pickernell* v. *Jauberry* (1862), 3 F. & F. 217.

(*z*) C. A. (1880), L. R. 5 C. P. D. 171, at p. 177.

(*a*) (1884) L. R. 10 App. C. 105, where he cites *Gledstanes* v. *Allen* (1852), 12 C. B. 202.

(*b*) C.A. (1884), 13 Q. B. D. 317. See also *Bryden* v. *Niebuhr* (1884), 1 C. & E. 241.

(*c*) *San Roman* (1872), 3 L. R. Adm. 583, 592. An action *in rem* against the ship; though the charterer and shipper were nominally different firms, they were in fact almost identical, and the decision cannot, it is submitted, be supported, except on this ground.

(*d*) *Gullichsen* v. *Stewart*, *vide supra*. See also *Bryden* v. *Niebuhr*, *vide supra*.

this case seems also to show that such a bill of lading would have overridden the cesser clause in the charter. Brett, L.J., in giving judgment against the charterers, said: "Pushed to its legitimate conclusion, the argument for the charterers would free them from liability for freight." The argument was pushed so far, it is submitted wrongly, by Denman, J., in *Barwick* v. *Burnyeat* (*e*). In that case the charterers, who were also consignees, pleaded that the cesser clause, which exempted them by name, after the ship's loading and payment of advance freight, from subsequent liability, relieved them from any liability under a bill of lading accepted by them, making the goods deliverable "to order or assigns, he or they paying freight for the same, and other conditions as per charter": and they were *held* not liable for freight. This case was not cited in *Gullichsen* v. *Stewart* or *Bryden* v. *Niebuhr*, but seems directly contrary to the principle of those decisions, and must, it is submitted, be taken as overruled.

Case 3.—D., as agent for C., negotiated a charter with A. for a lump freight of £735, "the master to sign bills of lading at any rate of freight without prejudice to this charter." C. shipped goods on his own account, and the master signed a bill of lading, making the goods "deliverable to C. or assigns, paying freight as usual." C. indorsed this bill to D. in part payment of advances on the cargo. *Held*, that D., both as agent for C. and as having knowledge of the charter, was liable to A.'s lien for the whole freight due under the charter, and not merely for the freight in the bill of lading (*f*).

Case 4.—C. agreed with A. to ship oranges by A.'s ship at 4*s.* 6*d.* per box. E., A.'s master, then signed bills of lading for oranges shipped by C. at 3*s.* 6*d.* per box. *Held*, that C. was liable for freight at 4*s.* 6*d.* and was not relieved by the bill of lading (*g*).

Case 5.—Charterer (C.) agreed to load a full cargo at a freight of "60*s.* per ton in full." The master was paid by the shipowner a fixed salary "to include all charges and allowances." He signed a bill of lading making the goods "deliverable to order or assigns, he or they paying freight, &c., as per charter, with 5 per cent. primage for cash on delivery as customary." D., indorsees of the bill of lading as agents of C., received the cargo at the port of discharge. *Held*, that the master could not sue D. for primage either for himself or for the owner (*h*).

Case 6.—C. chartered A.'s ship, "master to sign bills of lading, at any rate of freight, and as customary at port of loading, without prejudice to the

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(*e*) (1877), 36 L. T. 250.

(*f*) *Kern* v. *Deslandes* (1861), 10 C. B., N. S. 205, based in *Fry* v. *Mercantile Bank* (1866), L. R. 1 C. P. 689, on the position that D. really represented C.; and sustainable on that ground, *sed quaere*, whether on the facts this was so. *Small* v. *Moates* (183), 9 Bing. 574, and *Gledstanes* v. *Allen* (1852), 12 C. B. 202, are similar cases, but it is doubtful whether the reasoning of *Gullichsen* v. *Stewart*, *vide supra*, would not now release the charterer or his agent from their liabilities under the charter, which would be treated as superseded by the bill of lading.

(*g*) *Pickernell* v. *Janberry* (1862), 3 F. & F. 217.

(*h*) *Caughey* v. *Gordon* (1878), L. R. 3 C. P. D. 419 Here the master, without owner's authority, tried to introduce a new term into the contract, contrary to the charter, and which could only be for owner's benefit. *Held*, he could not.

stipulations of the charter." C. shipped goods under the charter, and the master signed a bill of lading containing an exception of "negligence of the master and crew," which was not in the charter. The goods were lost through the master's negligence. *Held*, that the master had no authority to insert such a clause in the bill of lading, that it could not prejudice the charter, and that the shipowners were therefore liable (*i*).

(b.) *Where the Shipper is other than the Charterer.*

Shippers of goods in a chartered ship, other than the charterer, who receive bills of lading signed by the master or broker:—

I. If they are ignorant of the charter, will be held to have contracted with and can sue the shipowner and not the charterer (*k*).

They cannot be required to accept bills of lading in accordance with the charter, if such charter involves unusual or onerous terms, but can demand their goods back, if shipped, at the ship's expense (*l*).

II. If shippers are aware of the charter, the master or broker, in signing bills of lading will be held to have acted as the charterer's agent (*m*) and the shipper cannot sue the owner (*n*) on the contract, unless his liability is reserved by special provisions of the charter (*o*). The burden of proving

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(*i*) *Rodoconachi* v. *Milburn* (1886), L. R. 17 Q. B. D. 316.

(*k*) *Sandemann* v. *Scurr* (1866), L. R. 2 Q. B. 86 (C.A.); *The Figlia Maggiore* (1868), L. R. 2 Adm. 106; *Hayn* v. *Culliford* (1878), L. R. 3 C. P. D. 410; *Wagstaff* v. *Anderson* (1880), L. R. 5 C. P. D. 171 (C.A.); *The St. Cloud* (1863), B. & L. 4. If the charter is a demise, they can sue the charterer in tort, he being in possession of their goods.

(*l*) *Peek* v. *Larsen* (1871), L. R. 12 Eq. 378; *The Stornoway* (1882), 51 L. J. Adm. 27. So also where there are a charter and a sub-charter, and the shipper only knows of one, he will not be bound by the other: *Tharsis Sulphur Co.* v. *Culliford* (1873), 22 W. R. 46; *The Emilien Marie* (1875), 44 L. J. Adm. 9.

(*m*) *The St. Cloud* (1863), B. & L. 4, at p. 15; *Newberry* v. *Colvin* (1832), 1 Cl. & Fin. 283; *Sandemann* v. *Scurr*, *vide supra*, at pp. 97, 98; *Blaikie* v. *Stembridge* (1859), 6 C. B., N. S. 894. See per Bramwell, L.J., in *Wagstaff* v. *Anderson*, *vide supra*, at p. 177. "I do not think that because a bill of lading is signed by the captain as agent for the ship, a contract is made between the shipowner and shipper, the shipper having previously arranged with the charterers that they shall carry his goods. I think that the remedy of the shipper would be against the charterer, with whom he made the contract of affreightment, and that he would not get an additional remedy, because he had taken a bill of lading from the shipowner."

(*n*) *Marquand* v. *Banner* (1856), 6 E. & B. 232; *Major* v. *White* (1835), 7 C. & P. 41.

(*o*) *The Helene* (1865), B & L. 415; *Sack* v. *Ford* (1862), 32 L. J. C. P. 12.

the shipper's knowledge of the charter will be upon the shipowner (*p*).

Unless there is a demise of the ship the owner will be liable to third parties, not parties to bills of lading, for dealings with goods by the master, even though such third parties know of the charter (*q*).

Case 1.—A. chartered a ship to C. to sail to X. and load from C.'s agent there, cargo to be stowed at merchants' risk and expense. The captain to sign bills of lading if required at any rate of freight, without prejudice to the charter. At X. goods were shipped by shippers, who knew nothing of the charter, under a bill of lading signed by the master. *Held*, that the shippers could sue A., the master having signed as his agent (*r*).

Case 2.—A.'s steamer was chartered to C.; F. shipped goods on it in ignorance of such charter, and received a bill of lading signed by "C., agents." There is a custom with steamships that the brokers and not the master should sign bills of lading. It was found as a fact that C. signed the bill of lading as agent for and with the authority of A. *Held*, that A. was liable to F., and would have been even if no such authority had existed (*s*).

Case 3.—On June 24, C., brokers, wrote to F., "we now beg to offer you room in ship *R.*" On June 26, F. accepted this, and an agreement was drawn up between F. and "C. acting for A., owners of the *R.*" On June 25, C. and D. jointly had chartered the R. from A., paying a lump freight, their liability to cease on loading. The master signed bills of lading, and on the voyage sold the goods. *Held*, that F.'s remedy was against A. and not against C. (*t*).

Case 4.—C. chartered a ship from A. and put it up as a general ship. F. put goods on board in ignorance of the charter. The captain refused to sign bills of lading except in terms of the charter, which gave the shipowner liens for demurrage and freight under the charter, and refused to deliver up the goods. *Held*, that shippers who had shipped in ignorance of the charter were entitled to demand their goods back rather than be bound by the provisions of the charter, and that the owners were bound to redeliver them free of any claim for lien or charges (*u*).

Case 5.—A ship was chartered by C. from A.; F. shipped goods under a bill of lading not referring to the charter. *Held*, that the owner was liable for bad stowage, unless he proved that the shipper had notice of the charter, in which case he was freed (*x*).

Case 6.—C. chartered a ship from A. and put it up as a general ship. F. shipped goods in it, in which C. had a right of property, and F. was enabled to ship those goods through the negligence of E., the master, in

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(*p*) *The St. Cloud* (1863), B. & L. 4.

(*q*) *Schuster* v. *McKellar* (1857), 7 E. & B. 704.

(*r*) *Sandemann* v. *Scurr* (1866), L. R. 2 Q. B. 86. See also *The Figlia Maggiore* (1868), L. R. 2 Ad. & E. 106.

(*s*) *Hayn* v. *Culliford* (1878) L. R. 3 C. P. D. 410.

(*t*) *Wagstaff* v. *Anderson* (1880), L. R. 5 C. P. D. 171 (C. A.).

(*u*) *Peek* v. *Larsen* (1871), L. R. 12 Eq. 378. The question would seem to be whether the shippers were, or should in reason have been, aware of the charter. See *Watkins* v. *Rymill* (1883), 10 Q. B. D. 178.

(*x*) *The St. Cloud* (1863), B. & L. 4.

signing bills of lading for them. At the end of the voyage E., with A.'s approval, delivered the goods to G., consignees under the bill of lading, in spite of O.'s demand for the goods. *Held*, that though E. in signing bills was probably acting as charterer's agent, yet in delivering the goods at the port of discharge with A.'s approval, he was acting as A.'s agent, and A. was therefore liable to an action by O. (*y*).

(c.) *Indorsee from Charterer.*

If a bill of lading given to the shipper, whether charterer or not, and differing in its terms from the charter, comes into the hands of G., a *bonâ fide* holder for value of such bill of lading.

I. If G. is ignorant of the charter, the shipowner will be bound by the bill of lading (*z*), even though his agent had no authority to sign it, provided that such bill is on its face within the ordinary authority of a master or broker (*a*), and that the difference in terms has not been obtained by fraud of any previous holder (*b*).

II. If G. is aware of the charter, the shipowner will not be liable to G. for a bill signed by his agent beyond any authority conferred by such charter (*c*).

III. In any case the terms of the charter will not be incorporated in the bill of lading without a plain expression in the bill of lading of the intention to do so (*d*).

Case 1.—A ship was chartered with certain excepted perils, including "restraint of princes." F. shipped goods in ignorance of the charter, and

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(*y*) *Schuster* v. *McKellar* (1857), 7 E. & B. 704. F. could only have sued E. or C. under the bill of lading; and if A. had demised the ship to C., O. could only have sued C., but as there was no demise, and O. did not sue in contract under the bill of lading, but in tort, A. was liable to O.

(*z*) *The Patria* (1871), 3 L. R. Adm. 436; *Gilkison* v. *Middleton* (1857), 2 C. B., N. S. 134.

(*a*) *Grant* v. *Norway* (1851), 10 C. B. 665, at pp. 687, 688; *Reynolds* v. *Jex* (1865), 7 B. & S. 86. And see Article 20, *post*, and note thereto, p. 44.

(*b*) *Mitchell* v. *Scaife* (1815), 4 Camp. 298.

(*c*) Article 20, *post*.

(*d*) *Chappel* v. *Comfort* (1861), 10 C. B., N. S. 802; *Fry* v. *Mercantile Bank of India* (1866), L. R. 1 C. P. 689; *Smith* v. *Sieveking* (1855), 4 E. & B. 945. "Where a charter is entered into, the special provisions of that charter are binding only as between the charterer and shipowner, and if a bill of lading is signed by the master, and that bill of lading comes to the hands of an assignee for value, the latter is entitled to have the goods delivered to him on the terms mentioned in the bill of lading, and, properly speaking, is not bound to refer to the charter at all" (Willes, J., in *Chappel* v. *Comfort*, at p. 810). This is subject to reference to the charter for any of its terms expressly incorporated in the bill of lading. And see *post*, Article 19.

the master signed a bill of lading only containing an exception of "perils of the sea." In an action *in rem* by G., the consignees, who also were ignorant of the charter, against ship, owner, and master, for failing to deliver through "restraint of princes," *held*, that the owner was liable, and that the contract in the bill of lading was not affected by the contract in the charter of which F. and G. were ignorant (*e*).

Case 2.—A ship was chartered by C. for a certain voyage, at a certain freight with a lien on the cargo for all freight, the master to sign bills of lading without prejudice to the charter. C. shipped goods for which the master signed a bill of lading, making the goods deliverable to G., "paying freight as per margin," i.e. £196. C. endorsed the bill for value to G. *Held*, that the owners having by their master signed bills making the goods deliverable on payment of a certain freight, could only claim that freight, and not the whole freight for which they had a lien under the charter, as against consignees who had advanced money on faith of the statements in the bill of lading (*f*).

Case 3.—A. chartered a ship to C. at a certain freight, "A. or his agent to sign bills of lading at any rate of freight without prejudice to this charter." D., C.'s agent abroad, advanced money to the ship, and in consideration of such advance the master loaded goods from D., giving a bill of lading, "shipped by D., to be delivered to order, or assigns, paying freight to D.'s agent, G., as per margin." *Held*, that the master had no authority to make such a contract, and that A. was not bound by it to G. consignees of cargo (*g*).

Case 4.—C. chartered a ship from A. to pay a certain freight, sixteen lay-days and demurrage at £2 *per diem*. C. shipped a cargo consigned to G. in London under a bill of lading "paying freight as per charter," with a memorandum in the margin, "There are eight working days for unloading in London." The vessel was detained four days beyond her lay-days. G. was sued by A. for demurrage. *Held*, that as the bill of lading did not clearly show that the conditions as to demurrage in the charter were incorporated in the bill of lading, G. was not liable (*h*).

Article 19.—*Incorporation of Charter in Bill of Lading.*

Where the holder of a bill of lading for goods shipped on a chartered vessel is either a shipper other than the charterer, whether aware of the charter or not (*i*), or an assignee of

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(*e*) *The Patria* (1871), 3 L. R. Adm. 436.

(*f*) *Gilkison* v. *Middleton* (1857), 2 C. B., N. S. 134. See also *Mitchell* v. *Scaife* (1815), 4 Camp. 298. This case is distinguishable from cases like *Kern* v. *Deslandes* (1861), 10 C. B., N. S. 205, by the fact that the holder is an indorsee for value, and not a mere agent or factor. Here too the owners seem to have authorised the signing of the bills of lading (see per Cockburn, J.), and so varied their lien. I have omitted the part of the case which was overruled in *Kirchner* v. *Venus* (1859), 12 Moore, P. C. 361, as to whether there was a lien for freight at all.

(*g*) *Reynolds* v. *Jex* (1865), 7 B. & S. 86. Such a contract as to freight was beyond the usual authority of a master, and should have put G. on inquiry. See also *Arrospe* v. *Barr* (1881), (Sc.) 8 C. of S. Cases, 602.

(*h*) *Chappell* v. *Comfort* (1861), 10 C. B., N. S. 802.

(*i*) *The Patria* (1871), 3 L. R. Adm. 436.

such bill for value, even from the charterer (*k*), the stipulations of the charter on any particular point will not be incorporated into the bill of lading without a plain expression in the bill of lading of the intention to do so (*l*).

Where such an intention plainly appears it will be adopted (*m*); thus the clause "freight and all other conditions as per charter," will incorporate into the bill of lading all conditions in the charter applicable to and consistent with the character of the bill of lading (*n*), but not inapplicable or insensible conditions (*o*), or clauses of the charter which would alter express stipulations in the bill of lading (*p*).

Under such a clause holders of the bill of lading have been held liable for charterparty demurrage at the port of loading (*q*) or at the port of discharge (*n*), but the cesser clause in a charter has been rejected as inapplicable to a bill of lading given to charterers (*o*).

Case 1.—C. chartered a ship from A. "the ship to have a lien on cargo for freight 70*s.* per ton . . . to be paid on unloading of the cargo. C. shipped part of the cargo under a bill of lading containing a clause: "freight for the said goods payable in Z. as per charter," and indorsed the bill for value to I. *Held*, that against I., the shipowner had a lien only for the freight due for the goods included in the bill of lading, and not a lien for the whole chartered freight (*r*).

Case 2.—C. chartered a ship from A. with a clause that fourteen working days were allowed for loading and unloading, and ten days on demurrage at £35 a day. F. shipped corn under a bill of lading: "paying freight for the same goods, and all other conditions as per charter." F. indorsed

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(*k*) *Fry* v. *Mercantile Bank of India* (1866), L. R. 1 C. P. 689.

(*l*) *Chappell* v. *Comfort* (1861), 10 C. B., N. S. 802; *Smith* v. *Sieveking* (1855), 4 E. & B. 945.

(*m*) *Wegener* v. *Smith* (1854), 15 C. B. 285.

(*n*) *Porteus* v. *Watney* (1878), L. R. 3 Q. B. D. 534, at p. 542 (C.A.); *Gardner* v. *Trechmann* (1884), 15 Q. B. D. 154 (C.A.). Willes, J., in *Russell* v. *Niemann* (1864), 17 C. B., N. S. 163, at p. 177, suggested that such a clause only incorporated conditions *ejusdem generis* with the payment of freight, and would not therefore incorporate exceptions in the charter wider than those in the bill of lading.

(*o*) *Gullichsen* v. *Stewart* (1884 (C.A.)), L. R. 13 Q. B. D. 317; *Bryden* v. *Niebuhr* (1884), 1 C. & E. 241; but see *Barwick* v. *Burnyeat* (1877), 36 L. T. 250, and note *ante*, p. 35.

(*p*) *Gardner* v. *Trechmann*, *vide supra*.

(*q*) *Gray* v. *Carr* (1871), L. R. 6 Q. B. 522.

(*r*) *Fry* v. *Mercantile Bank of India* (1866), L. R. 1 C. P. 689. See also *Mitchell* v. *Scaife* (1815), 4 Camp. 298. The Court based their decision on the grounds: (1) That a clear intention to give the extended lien was not shown: *Chappell* v. *Comfort*, *vide supra*. (2) That the charter fixed the rate of freight and not a lump freight, and this only was incorporated in the bill of lading. Such a division of liability will not be applied to demurrage: *Porteus* v. *Watney*, *vide supra*.

the bill to I. for value. At the port of discharge owing to delay of other shippers, I. was delayed in removing his goods, and three days' demurrage was incurred. *Held*, that I. was liable to pay demurrage as per charter. *Semble*, that A. could recover the demurrage for the three days from each of the shippers (*s*).

Case 3.—A charter provided for payment of freight at £1 13*s.* 3*d.* per ton, and gave the charterer an absolute lien for freight; the bill of lading provided for payment of freight at £1 2*s.* 6*d.* per ton, "extra expenses to be borne by the receivers, and other conditions as per charter." *Held*, not to incorporate in the bill of lading the clauses of the charter as to freight (*t*).

Case 4.—A ship was chartered by C. from A. with the usual stipulations for freight and demurrage and a cesser clause. C. shipped the cargo, accepting bills of lading making the goods deliverable to himself at the port of discharge; "he paying freight and all other conditions as per charter." In an action by A. against C. as consignee under the bill of lading, for demurrage at the port of discharge. *Held* C. was liable; for the bill of lading only incorporated those clauses of the charter which were consistent with its character, as a bill of lading, and did not therefore incorporate the "cesser clause" (*u*).

Case 5.—A ship was chartered by C. from A., "fifty running days to be allowed for loading, and ten days on demurrage over and above the said lay-days at £8 per day . . . A. to have a lien for demurrage," and a cesser clause. C. shipped goods under a bill of lading, "to be delivered as per charter unto order of C. or assigns, he or they paying freight and all other conditions or demurrage (if any should be incurred for the said goods) as per charter." The ship was detained in loading ten days on demurrage, and eighteen days more. A. claimed a lien for demurrage for ten days, and damages for the eighteen days' detention against G. consignees under the bill of lading. *Held*, that G. was liable for the demurrage, but not for the damages for detention, which were not given by the charter or the bill of lading (*x*).

Article 20.—*Authority of Master or Broker to sign Bills of Lading* (*z*).

I. *Where no Goods are shipped.*

The master or broker cannot bind the owner or principal by signing bills of lading for goods that were never shipped

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(*s*) *Porteus* v. *Watney* (1878), L. R. 3 Q. B. D. 534 (C.A.); disapproving *Rogers* v. *Hunter* (1827), M. & M. 63; *Dobson* v. *Droop* (1830), M. & M. 441; *quære*, whether the charter would not be satisfied by the charterers receiving £10 *per diem* from *one* shipper, though in justice such shipper should have a right, which he has not in law, to require contribution from other shippers. See also *Straker* v. *Kidd* (1878), L. R. 3 Q. B. D. 224; *Leer* v. *Yates* (1811), 3 Taunt. 387; *Harman* v. *Gandolph* (1815), Holt. 35.

(*t*) *Gardner* v. *Trechmann* (1884), 15 Q. B. D. 154.

(*u*) *Gullichsen* v. *Stewart* (1884), 13 Q. B. D. 317.

(*x*) *Gray* v. *Carr* (1871), L. R. 6 Q. B. 522.

(*z*) The question of authority to sign bills of lading does not often arise, as each line has its printed form, or forms, which are hardly ever varied. When a ship is under charter, and is put up by the charterers as a general ship, power is

at all (*a*); but the bill of lading is *primâ facie* evidence that they were shipped, and the burden of disproving it lies on the owner (*b*).

Neither can the master or broker bind the owner by signing a second bill of lading for goods on board, for which he has already signed one bill (*c*).

Such a bill has no further binding effect (*b*), even in the hands of a *bonâ fide* holder for value.

Case 1.—C. chartered a ship of the capacity of 596 tons, from A., to carry bones. The master signed bills of lading representing that 701 tons were shipped, but containing the clause: "weight, quality and contents unknown." On arrival, the ship was found to have only 386 tons on board; the master had protested for inadequacy of freight. *Held*, that the signature of the master to the bills threw upon A. the burden of disproving the shipment of the goods, but that he had disproved it by the evidence of the master that he delivered all goods that were shipped, and by the protest (*b*).

Case 2.—E., master of A.'s ship gave a bill of lading to F. for twelve bales of silk represented as being shipped on such ship; F. indorsed the bill for value to I.; the goods never had been shipped. I. sued A., who proved that the goods never were on board. *Held*, that A. was not liable, even to I. (*d*).

Case 3.—F. shipped on board A.'s ship seventy and seventy-five quarters of wheat, and received bills of lading signed by E., A's master. F. indorsed these bills to I. F. then induced E. by fraud to sign another bill of lading for 145 quarters, which he indorsed to H. E. delivered to H. under the second bill. I. then sued A. *Held*, that E. had no authority to sign H.'s bill, which was a second bill, having already signed one bill for the same

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usually given to the master by the charter to sign bills of lading in any form, "without prejudice to the charter," *i.e.*, to the contract between shipowner and charterer (see note *post* p. 45). On the statutory liability of the person signing a bill of lading for goods not shipped, see 18 & 19 Vict. c. 111 s. 3: Appendix III., and Article 21.

(*a*) *McLean* v. *Fleming* (1871), L. R. 2 Sc. App. 128; *Brown* v. *Powell Duffryn Coal Co.* (1875), L. R. 10 C. P. 562; *Jessel* v. *Bath* (1867), L. R. 2 Ex. 267; *Grant* v. *Norway* (1851), 10 C. B. 665.

(*b*) *McLean* v. *Fleming*, *vide supra*.

(*c*) *Hubbersty* v. *Ward* (1853), 8 Ex. 330.

(*d*) *Grant* v. *Norway* (1851), 10 C. B. 665. At first sight this case appears inconsistent with such cases as *Gilkison* v. *Middleton* (1857), 2 C. B., N. S. 134; *Howard* v. *Tucker* (1831), 1 B. & Ad. 712; *Mitchell* v. *Scaife* (1815), 4 Camp. 298; in which statements as to liability for freight in a bill of lading were held to bind the owner as against an indorsee for value, though such statements limited the charter, and were made without the owner's authority. The distinction seems to be that in these cases the owner recognises a contract of carriage made by his master, but seeks to vary the terms of it; while in *Grant* v. *Norway* and similar cases, he repudiates any contract of carriage, for no goods were ever shipped to be carried, and therefore there was no contract of affreightment to embody in a bill of lading. The distinction is hardly very satisfactory, especially to the innocent holder, who has advanced money in good faith on the representation that there are goods in the ship to which his bill of lading entitles him.

goods, and that as I.'s bills were prior and genuine, I. was entitled to recover (*e*).

Case 4.—Sleepers were shipped under a charter containing this clause, "the bill of lading shall be conclusive evidence against the owner of the quantity of cargo received;" 2,000 sleepers were delivered in the water alongside the ship, and the mate signed a receipt for them; some were lost before shipment, but the captain signed a bill for the whole 2,000. *Held*, that the captain had no authority to sign for sleepers not shipped, and therefore the owners were not bound by his signature (*f*).

II. *Where Goods are shipped.*

(1.) *The Ship not being chartered.*

(*a.*) If the owner has given no express instructions to his master he will be bound by any term of the bill of lading within the ordinary authority of a master. He will not be bound by any term outside such ordinary authority (*g*).

(*b.*) If the owner has given express instructions to his master, he will be bound by any bill within those instructions, or by any bill within a master's ordinary authority, given to a shipper ignorant of those instructions.

He will not be bound by any bill beyond the master's ordinary authority and his instructions, or by any bill beyond the master's instructions given to a shipper knowing of such instructions (*g*).

(2.) *The Ship being chartered.*

In the absence of any special provisions in the charter, or express instructions (*h*), the master or broker has no authority to vary the contract the owner has already made, by signing bills of lading (*i*) differing from the charter.

But if without such authority he varies the contract on some point within his authority as master, if there were no

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(*e*) *Hubbersty* v. *Ward* (1853), 8 Ex. 330.

(*f*) *Pyman* v. *Burt* (1884), 1 C. & E. 207. See also *Thorman* v. *Burt* (1885), 1 C. & E. 596.

(*g*) See *Grant* v. *Norway* (1851), 10 C. B. 665; *Reynolds* v. *Jex* (1865), 7 B. & S. 86. As to "the ordinary authority of a master," see note 44, *post*.

(*h*) Such as "Master to sign bills of lading as presented to him by charterers, without prejudice to the terms of the charter:" for a discussion of this see *Arrospe* v. *Barr* (Sc.) (1881), 8 C. of S. Cases, 602.

(*i*) *Pickernell* v. *Jauberry* (1862), 3 F. & F. 217; *Rodoconachi* v. *Milburn* (1886), 17 Q. B. D. 316.

charter, as the rate of freight (*j*), and the bill of lading is given to a shipper other than the charterer, or being given to the charterer, comes into the hands of a *bonâ fide* holder for value (*j*), the owner, if he recognises the master's contract of carriage must also recognise all the terms of it (*k*).

If, however, the variations are clearly beyond the ordinary authority of a master, as if the master contracts to carry goods freight free (*l*), or if he makes freight under the bill of lading payable to a third party other than the owner or his agent (*m*), the owner will not be bound by the contract represented in the bill of lading to exist, even to a *bonâ fide* holder for value of such bills of lading (*n*).

Note.—The *ordinary authority of a master* has lessened very much of recent years (*o*). The electric telegraph has enabled the owner to perform much of the master's work in foreign ports. The system of printed bills of lading, and the extensive development of regular lines of steamers, with their accompanying agents and branches abroad, have converted the master into little more than the chief navigator of the ship. In the ports of loading and discharge he has commonly very little to do. On most steam lines the master has no authority to alter the printed bill of lading, or to fix the rate of freight, or to charter the ship, or to make engagements to carry goods in her; he may indeed sign bills of lading abroad, but his signature only acknowledges the quantity and the external condition of the goods. On such lines therefore the ordinary authority of a master in port is very small, and though on the voyage the necessity of the case may confer on him considerable power (*p*),

(*j*) As in *Mitchell* v. *Scaife* (1815), 4 Camp. 298: but see note p. 45, *post*.

(*k*) *Mercantile Exchange Bank* v. *Gladstone* (1868), L. R. 3 Ex. 233, at p. 240.

(*l*) *Grant* v. *Norway* (1851), 10 C. B. 665. See also *Walshe* v. *Provan* (1853), 8 Ex. 843. For an instance of authority to carry freight free, see *Mercantile Exchange Bank* v. *Gladstone* (1868), L. R 3 Ex. 233, 240.

(*m*) *Reynolds* v. *Jex* (1865), 7 B. & S. 86. It is doubtful whether the master has authority to make advances to himself or ship a first charge or deduction from the freight payable under charter or bill of lading: *Gibbs* v. *Charleton* (1857), 26 L. J., N. S. Ex. 321.

(*n*) *Grant* v. *Norway*, *Reynolds* v. *Jex*, *Mercantile Bank* v. *Gladstone*, *vide supra*. In *Grant* v. *Norway*, signing a bill of lading for goods not on board is included under this head, but though this is a contract beyond the master's authority, there is nothing on the face of the bill of lading to show that he has exceeded his authority; in the freight cases there is, and the unusual provision should at once suggest inquiry. It seems best therefore to rest the case of goods not on board, on the absence of any contract of carriage, of which the bill of lading might be evidence.

(*o*) For a statement of the "ordinary authority of a master" thirty years ago, see *Grant* v. *Norway* (1851), 10 C. B. 665, at p. 687.

(*p*) See Section VII., *post*.

increased facilities of communication have much diminished the cases where, as he cannot communicate with his owners, such necessity arises. The law as stated, and the cases supporting it, must therefore be read subject to the proviso that the position of the master has materially altered of late years; the master has been superseded partly by the owner and partly by the broker, and the broker's or master's authority is usually strictly defined by the printed bill of lading, except in the cases where the captain is "to sign bills of lading as presented by the charterers without prejudice to the charter." In these cases he is bound to sign any usual and ordinary bill presented to him, and his not doing so is a breach of the charter (*q*); but where the charterers are also shippers, the master cannot prejudice the contract in the charter by inserting exceptions in the bill of lading which go further than the charter (*r*).

Case 1.—C. agreed with A. to ship oranges by A.'s ship at 4*s.* 6*d.* per box; E., A.'s master, then signed bills of lading for oranges shipped by C. at 3*s.* 6*d.* per box. *Held*, that C. was liable for freight at 4*s.* 6*d.* and was not relieved by the bill of lading (*s*). *Submitted*, that a *bonâ fide* holder for value of the bill of lading would only have been liable for freight at 3*s.* 6*d.*, the rate of freight being a matter within the master's ordinary authority (*t*).

Case 2.—A. chartered a ship to C., at a certain freight, "the owner or his agent to sign bills of lading at any rate of freight, without prejudice to this charter." D., C.'s agent abroad, advanced money to the ship, and in consideration of such advance the master shipped goods from D., giving a bill of lading "shipped by D., to be delivered to order or assigns, paying freight to D.'s agent G., as per margin." *Held*, that the master had no authority to make such a contract, and that A. was not bound by it to G., consignees of the cargo (*u*).

Case 3.—A. chartered a ship to C., the master to sign bills of lading as presented, without prejudice to the charter. C. shipped goods, and presented bills in the ordinary form, which the master refused to sign unless they contained the clause: "The vessel not liable for duties on cargo, by non-arrival before July 1." *Held*, such refusal was a breach of the charter (*q*).

Case 4.—C. chartered a ship, "the master to sign bills of lading at any rate of freight, and as customary at port of loading, without prejudice to the stipulations of the charter." The master signed and delivered to C. bills of lading including an exception not in the charter. *Held*, that he had no authority, by so doing, to vary the contract between shipper and charterer; and that the shipowner was not freed from liability for loss through such excepted peril (*r*).

(*q*) *Jones* v. *Hough* (1879), L. R. 5 Ex. D. 115: the clause is discussed in *Arrospe* v. *Barr*, (Sc.) (1881), 8 C. of S. Cases, 602.

(*r*) *Rodoconachi* v. *Milburn* (1886), L. R. 17 Q. B. D. 316.

(*s*) *Pickernell* v. *Jauberry* (1862), 3 F. & F. 217.

(*t*) See *Mitchell* v. *Scaife* (1815), 4 Camp. 298; but see note p. 44, *ante*.

(*u*) *Reynolds* v. *Jex* (1865), 7 B. & S. 860.

Article 21.—*Statutory Liability of Persons signing Bill of Lading.*

In the hands of a consignee or indorsee for value (*x*) the bill of lading is by statute (*y*) conclusive evidence that the goods represented by it to be shipped were actually shipped, as against the person signing it (*z*), unless either (1) the holder took the bill with actual notice that such goods were not on board; or, (2) the signer shows that the mistake was not occasioned by his default, but was wholly (*a*) occasioned by the fraud of the shipper, holder, or some person under whom the holder claims (*y*).

Note.—The bill of lading is not conclusive as between the signer and the shipper, nor as between the owner and the shipper (*b*), nor as between owner and holder for value (*x*), unless the owner actually signs it. Thus, where the master who signs is also part owner, and sues on the bill, the statute applies against him (*x*). But in all these cases, the statements in the bill of lading are *primâ facie* evidence, which the person disputing them must disprove (*c*). Master and broker obtain some protection from the clause "weight, value and contents unknown" (Article 52).

Case.—F. shipped on board A.'s ship seventy and seventy-five quarters of wheat, and received two bills of lading signed by E., A.'s master; F. indorsed these bills to I. F. then by fraud induced E. to sign another bill for 145 quarters, which he indorsed to H. *Submitted* (*d*), that H. would have had no action against E., if he had delivered the wheat to I. under the first bill.

Article 22.—*Through Bills of Lading.*

A "through bill of lading" is one made for the carriage of goods from one place to another by several shipowners or railway companies.

(*x*) *Meyer* v. *Dresser* (1864), 16 C. B., N. S. 646.

(*y*) 18 & 19 Vict. c. 111, s. 3 (1855): see Appendix III., *post.*

(*z*) Formerly almost always the master, but now the broker usually signs bills for steamships: *Hayn* v. *Culliford* (1878), L. R. 3 C. P. D. 410.

(*a*) Mistake or negligence of the master, not fraudulent, will not enable the indorser to sue, if there has been fraud either of the shipper, his agent, or his vendor: *Valieri* v. *Boyland* (1866), L. R. 1 C. P. 382. See also *Pyman* v. *Burt* (1884), 1 C. & E. 207, where the master's signature was obtained by pressure of the shipper's clerk.

(*b*) *Bates* v. *Todd* (1831), 1 M. & R. 106.

(*c*) *M'Lean* v. *Fleming* (1871), L. R. 2 Sc. App. 128; *Jessel* v. *Bath* (1867), L. R. 2 Ex. 267; *Grant* v. *Norway* (1851), 10 C. B. 665.

(*d*) On authority of *Hubbersty* v. *Ward* (1853), 8 Ex. 320, which see.

The contract in such bill of lading to carry for the whole distance is one contract made with the company signing and delivering the bill of lading (*e*), and in the absence of express provisions that company would be liable for loss occurring on any part of the journey (*f*).

The freight also, if paid in advance, is usually payable for the whole journey, and should the goods be lost on one of the stages, the shipper is not entitled to a *pro rata* return of the freight for other stages, as if the consideration had failed (*g*).

Semble, that the companies, other than the company which signs and delivers the bill of lading, are not liable on the contract of carriage contained in such bill of lading, unless the signing company had authority to act in their behalf (*h*), or its action was afterwards ratified by them. But they will be liable as carriers for goods shipped on board their ships, or to an action of tort for negligent dealings with such goods (*i*).

Note.—The through bill of lading sometimes incorporates the provisions of another bill of lading of one of the carrying companies; e. g., "All responsibility of the O. line is to cease on transhipment at Y., or on delivery of goods to the agents of the U. line at Y. for the purpose of transhipment, which company shall then be alone responsible on the terms of their bill of lading for the intercolonial trade." In some cases where the bulk of the carriage is done by one company, but goods are collected at foreign or out-ports before the commencement of the

(*e*) *G. W. R.* v. *Blake* (1862), 7 H. & N. 987; *Thomas* v. *Rhymney R. Co.* (1871), L. R. 6 Q. B. 266; *Bristol & Exeter Co.* v. *Collins* (1859), 7 H. L. C. 194; *Webber* v. *G. W. R.* (1865), 34 L. J. Ex. 170.

(*f*) Such an express provision usually exists; *e.g.*, "when any of the several companies connected with the transit of the goods shall have delivered the goods or any of them, to any other carrier to be transported to their destination, its liability shall cease altogether, such company being liable only for such loss or damage as may occur while the goods are in its possession, and for which it is legally liable. On its effects, see *Fowles* v. *G. W. R.* (1852), 7 Ex. 699.

(*g*) *Greeves* v. *West India Co.* (1870), 22 L. T. 615. The case is frequently expressly provided for by the clause, "freight to be considered earned, ship lost or not lost, at any stage of the entire transit."

(*h*) Such authority must be a question of fact in each case. It will not be proved by a statement in the bill of lading that the signing company signs as their agent, though such statement, if false, may subject the signing company to an action for misrepresentation of authority. The companies concerned will probably always acknowledge the through bill of lading, and claim its protection.

(*i*) *Self* v. *L. B. & S. C. R.* (1880), 42 L. T. 173; *Foulkes* v. *M. D. R. Co.* (1879), L. R. 4 C. P. D. 267.

engagement, or delivered at foreign or out-ports on its termination, clauses like the following are used:—

"Goods shipped at foreign or outports may be conveyed to London by steamer $\frac{\text{and}}{\text{or}}$ rail, craft, sailing vessel, and thence by rail to Southampton, or by steamer, craft, $\frac{\text{and}}{\text{or}}$ sailing vessel to Southampton direct, always at merchant's risk, but ship's expense."

"Cargo deliverable at foreign or outports will be landed or conveyed by rail, $\frac{\text{and}}{\text{or}}$ craft, steamer, sailing vessel, to port of destination, at merchant's risk throughout. Freight will be chargeable at the highest rate of exchange current in London."

Another clause is: "That any loss, damage, or detention of goods in this through bill of lading for which the carrier is liable must be claimed against the party only in whose possession the goods were when the loss, damage, or detention occurred. These through goods are also subject to all conditions of the company or companies which assist in their conveyance; and all the provisions and conditions of this through bill of lading apply to said carriers and shipowners respectively. This bill of lading is also subject to all the conditions in the ordinary receipts given by each company respectively over whose line the goods carried by this bill of lading pass to their destination."

For discussion of a through bill of lading for sea and land carriage, see *Moore* v. *Harris* (*k*).

Who may sue and be sued for negligent carriage of goods: see Articles 92, 93.

Who may sue in rem, under the Admiralty Jurisdiction Act: see Article 77.

Who may sue and be sued for freight: see Articles 148, 149.

Who may sue and be sued for general average contributions: see Articles 118, 119.

Who may sue and be sued for demurrage: see Articles 134, 135.

(*k*) (1876), L. R. 1 App. C. 318.

SECTION III.

Representations and Undertakings in the Contract.

Article 23.—*Representations and Conditions Precedent.*

Representations made in connection with a charter are either:—

(1.) embodied in the charterparty.

(2.) not embodied in the charterparty.

Representations not embodied in the charter may be material in civil cases, either as estopping the party making them from denying their truth, or as rendering the contract voidable at the instance of the party relying on them, if they are false and fraudulent (*a*).

Representations embodied in the charter are either of facts as then existing, as of the then position of the ship, or of her class on the register; or are promises for the future, as that a ship will be ready to load by a given day.

Such representations are either:—

I. *Conditions Precedent,* to be regarded as essential parts of the contract, which is conditional on their truth. Their breach therefore entitles the other party to repudiate the charter, or

II. *Terms of the Contract* which one party has promised to be true. Their breach only gives rise to an action for damages, for their truth is not of such importance to the contract that their falsehood should destroy the ground of agreement between the parties (*b*).

The breach of a condition precedent being waived by one party in so far that he does not repudiate the contract

(*a*) See judgment of Stephen, J., in *Alderson* v. *Maddison* (1880), L. R. 5 Ex. D. 293: discussed in Pollock on Contracts, 4th ed., pp. 484, *et seq.*

(*b*) *Behn* v. *Burness* (1863), 3 B. & S. 751 (Ex. Ch.).

converts the condition precedent into a simple term of the contract, its breach giving an action for damages.

If the party claiming to repudiate for breach of a condition precedent, has already after knowledge of the breach received substantial benefit under the contract, for which he will give no equivalent if he is allowed to repudiate the contract, he will not be entitled to repudiate, but will only have an action for damages (*c*).

It is for the Court to determine whether a representation is a condition precedent, the jury finding the surrounding circumstances, from which the intention of the parties to the charter can be inferred (*d*).

Note.—It is unusual to have any dispute about conditions precedent in a bill of lading: (1) because such disputes usually arise when the ship has sailed, and the shipper has no opportunity of reclaiming his goods; and (2) because statements in a bill of lading are rarely important to original shippers. It is submitted that the description of the vessel in the bill of lading, and any statement as to her destination or route, probably also any statement as to her date of sailing on shipping cards are, if insisted upon, conditions precedent (*e*), and that substantial inaccuracies in these matters, if discovered before the ship sails, would entitle the shipper to require his goods back, free of freight and expenses.

In *Fraser* v. *Telegraph Co.* (*f*) a statement in the bill of lading, "shipped on board the steamship *S.*, from X. to Z.," was held to constitute a contract that the goods should be carried by a vessel whose principal motive power was steam: the ship was a sailing vessel with an auxiliary screw, and made the voyage entirely under sail. *Held*, that the contract was broken. *Semble*, that if the shipper had discovered the character of the ship and her intended mode of progress, after he shipped the goods, but before she sailed, he could have demanded his goods back, free from freight and expenses, on failure of a condition precedent.

Case 1.—A ship was chartered on October 19 as "the *S.* now in the port of Amsterdam . . . should with all possible despatch proceed to Newport and there load." On October 15 the *S.* was at Dieppe, sixty-

(*c*) *Behn* v. *Burness, vide supra; Ohlsen* v. *Drummond* (1785), 4 Dougl. 356; *Havelock* v. *Geddes* (1809), 10 East, 555; *Graves* v. *Legg* (1854), 9 Ex. 709, 716; *Pust* v. *Dowie* (1864), 5 B.& S. 20; *McAndrew* v. *Chapple* (1866), L. R. 1 C. P. 643.

(*d*) *Behn* v. *Burness, vide supra; Oppenheim* v. *Fraser* (1876), 34 L. T. 524.

(*e*) See *Peel* v. *Price* (1815), 4 Camp. 243, where the shipowner, after delivering a card giving destination, Z. by way of Y., subsequently altered it to Y. by way of Z., and it was held that he was bound to give specific notice of the alteration to each shipper under the first card.

(*f*) (1872), 7 L. R. Q. B. 566.

two miles from Amsterdam, and could have arrived there in twelve hours, but, owing to contrary winds and absence of steam-power, she did not arrive at Amsterdam till the 23rd. She discharged as quickly as possible, and reached Newport on December 1. The charterers refused to load. *Held*, that it was for the judge to construe this contract and decide as to the materiality of its statements, being influenced not only by its language, but also by the circumstances under which, and the purposes for which, it was entered into, which circumstances and purposes were to be found by the jury. That in this case the evidence shewed that the time of the ship's arrival to load was an essential fact for the charterer to know, and that the position of the ship at the time of entering into the charter was the only *datum* from which the charterer could calculate the time of the ship's arrival. That the truth of the words "now in the port of A." was, therefore, a condition precedent to the obligation of the charter, and their untruth entitled the charterer to repudiate it (*g*).

Case 2.—A contract was made for the sale of such rice as may arrive by the ship *S.* "now at Rangoon." The ship was not then at Rangoon, and the buyers repudiated the contract. *Held*, that evidence that the presence of ship and cargo at Rangoon was of vital importance to the parties, as the prohibition of the export of rice from Rangoon was expected in consequence of famine in India, was admissible. *Per Blackburn, J.*: "It is never a fact to go to the jury what the words of a contract mean, but it is a fact to go to them under what circumstances are they made, and to what do they relate;" and the contract must be construed by the judge in connection with the findings of the jury on these points (*h*).

Case 3.—A ship was chartered for twelve months certain, from December 24; and the owner covenanted that the ship should be at his expense forthwith made seaworthy for a voyage of twelve months and kept seaworthy during the voyage. She was not in fact seaworthy, but the charterer employed her for several months. *Held*, that under the circumstances, seaworthiness was not a condition precedent to the payment of freight (*i*).

Case 4.—A ship was chartered at a freight of £1500, on condition of her taking a cargo of not less than 1000 tons of weight and measurement; she could not carry such a cargo; but the charterers loaded a cargo and the ship sailed with it. *Held*, that even if the condition was broken, it was only under the circumstances a ground for damages and not a condition precedent (*j*).

Case 5.—A ship was chartered to proceed to a safe port near Cape Town. The charterer did not name a port, but offered to send a supercargo with the ship to do so. *Held*, that his naming a port was a condition precedent to the obligation of the shipowner to commence the voyage (*k*).

Case 6.—A ship was chartered to be ready on or before November 10, or charterers to have the option of cancelling the agreement. *Held*, that such readiness was a condition precedent to the charter.

The charter also contained a clause that the captain should attend daily at the broker's office to sign bills of lading. *Held*, that such daily attendance was not a condition precedent to obligation under the charter (*l*).

(*g*) *Behn* v. *Burness* (1863), 3 B. & S. 751.

(*h*) *Oppenheim* v. *Fraser* (1876), 34 L. T. 524. See also *Gorrissen* v. *Perrin* (1857), 2 C. B., N. S. 681.

(*i*) *Havelock* v. *Geddes* (1809), 10 East, 555.

(*j*) *Pust* v. *Dowie* (1864), 5 B. & S. 20.

(*k*) *Rae* v. *Hackett* (1844), 12 M. & W. 724. See also *Ohlsen* v. *Drummond* (1785), 4 Dougl. 356; *Bradford* v. *Williams* (1872), L. R. 7 Ex. 259.

(*l*) *Seeger* v. *Duthie* (1860), 8 C. B., N. S. 45.

Article 24.—*Ship's Class on the Register.*

A statement in the charter of the ship's class on the register amounts only to a condition precedent that the ship at the time of making the charter is actually so classed (*m*) and not that she is rightly so classed (*n*), or that she will continue to be so classed during the term of the charter-party (*o*).

Case 1.—A ship was chartered as the "A 1 British brig, *S.* of Liverpool." *Held*, a condition precedent to the charter that at the time of its making the ship was classed A 1 at Lloyd's (*m*).

Case 2.—On September 4, a ship was chartered as "A 1½ record of American and foreign shipping book . . . the ship *S.* newly classed as above." At that date the statement was correct. On November 13 she arrived at New Orleans to receive her cargo, and on November 25 her classification was cancelled for unseaworthiness (*p*). *Held*, that the statement was only a warranty of the ship's being so classed at the making of the charter, and was not a continuing warranty of her being rightly in such class, or remaining so classed (*n*).

Case 3.—A ship was chartered as "the good ship *S.* A 1." During her voyage she ran off her letter. *Held*, to amount to a warranty of her class at Lloyd's at the time of her charter, but not to a warranty that she should continue of that class during the charter, or that the owners would omit no act necessary to retain her in that class.

Article 25.—*Ship's Tonnage.*

A variation from the ship's tonnage as named in the charter will not be a breach of a condition precedent, unless the jury find the difference unreasonably great, or such as to be of material importance to the contract (*q*).

Note.—The charterer will be bound to load a full cargo, and not merely the number of tons stated in the charter as the ship's

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(*m*) *Routh* v *Macmillan* (1863), 2 H. & C. 750.

(*n*) *French* v. *Newgass* (1878), 3 C. P. D. 163.

(*o*) *Hurst* v. *Usborne* (1856), 18 C. B. 144, approved in *French* v. *Newgass*, *vide supra*.

(*p*) The charterer could throw up the charter for unseaworthiness, if it could not be remedied within a reasonable time. See Article 29, *post*.

(*q*) So held in *Barker* v. *Windle* (1856), 6 E. & B. 675, where the chartered tonnage was from 180 to 200 tons, the actual tonnage 258 tons; and *Gibbs* v. *Grey* (1857), 2 H. & N. 22, where the difference was between 470 and 350 tons.

capacity (*r*): but where the charter is to load a cargo of a named number of tons, which is less than the capacity of the ship, the charterer is only bound to load a reasonable amount beyond the stated capacity (*s*). See Article 46, *sub.*

Article 26.—*Ship's Name and National Character.*

Substantial accuracy in the name of the vessel will be a condition precedent.

The national character of the vessel as stated in the charter may be a condition precedent; *e.g.*, in time of war, when neutrality is an important circumstance (*t*). But a warranty of national character cannot be inferred from the mere name of the ship, and has been held, in policies of insurance, only to refer to the time of the execution of the charter, and not to be a warranty continuing during the currency of the charter (*u*).

Article 27.—*Whereabouts of Ship and Time of Sailing.*

A statement of the position of the ship at the time of making the charter (*x*), or that she will be at a certain place by a certain day (*y*), or that she will be ready to receive cargo by a certain day (*z*), or that she will sail on her voyage by a certain day (*a*), is usually a condition precedent to

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(*r*) *Thomas* v. *Clark* (1818), 2 Stark. 452; *Hunter* v. *Fry* (1819), 2 B. & Ald. 421.

(*s*) *Morris* v. *Levison* (1876), L. R. 1 C. P. D. 155. In this case a margin of 3 per cent. was allowed: in *Alcock* v. *Leeuw* (1884), 1 C. & E. 98, a margin of 10 per cent. either way was allowed. Now (1886) a cargo of so many tons "or thereabouts," is taken to allow a margin of 5 per cent. either way.

(*t*) *Behn* v. *Burness* (1863), 3 B & S. 751, at p. 757.

(*u*) Arnould on Insurance, 5th ed., p. 589; *Baring* v. *Christie* (1804), 5 East, 398; *Dent* v. *Smith* (1868), L. R. 4 Q. B. 414.

(*x*) *Behn* v. *Burness* (1863), 3 B. & S. 751; *Ollive* v. *Booker* (1847), 1 Ex. 416; *Oppenheim* v. *Fraser* (1876), 34 L. T. 524.

(*y*) *Corkling* v. *Massey* (1873), L. R. 8 C. P. 395.

(*z*) *Oliver* v. *Fielden* (1849), 4 Exch. 135; *Seeger* v. *Duthie* (1860), 8 C. B., N. S. 45; *Shadforth* v. *Higgin* (1813), 3 Camp. 385.

(*a*) *Glaholm* v. *Hays* (1841), 2 M. & G. 257; *Van Baggen* v. *Baines* (1854), 9 Ex. 523; *Deffel* v. *Brockelbank* (1817), 4 Price, 36.

obligations under the charter. The fact that the breach of such a condition precedent results from perils excepted in the charter will not prevent its being a condition precedent (*b*).

A statement that a ship will proceed or sail or load with all convenient speed is not a condition precedent, unless the delay frustrates the commercial purpose of the voyage (*c*).

Case 1.—*Behn* v. *Burness* (*d*), *vide ante*, p. 51, case 1,

Case 2.—A ship was chartered "now at sea, having sailed three weeks ago," to sail to X. and there load a cargo. The ship had not in fact "sailed three weeks ago." *Held*, the statement was a condition precedent, and its breach entitled the charterer to throw up the charter (*e*).

Case 3.—A ship was chartered "expected to be at X. about the 15th December . . . shall with all convenient speed sail to X." The ship was in fact then on such a voyage that she could not complete it and be at X. by December 15. *Held*, that the charterer was entitled to throw up the charter (*f*).

Case 4.—A ship was chartered "now on the stocks, and ready to receive cargo in all May." *Held*, a condition precedent (*g*).

Case 5.—A ship was chartered "to proceed to X., the vessel to sail from Y. on or before the 4th of February." *Held*, a condition precedent (*h*).

Case 6.—Charter to proceed to X., "and on arrival there to load and to sail with June convoy, provided she arrived out and was ready to load sixty-five running days previous to the sailing of such convoy." The ship was not ready to load sixty-five days before the June convoy. *Held*, the breach only absolved her from sailing with the June convoy, and did not free her altogether from her obligation to load and proceed (*i*).

Case 7.—A ship was chartered to proceed to X. and there load . . . "the act of God, and perils of the seas during the said voyage always excepted; should the steamer not be arrived at X. free of pratique and ready to load

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(*b*) *Smith* v. *Dart* (1884), L. R. 14 Q. B. D. 105; *Croockewit* v. *Fletcher* (1857), 1 H. & N. 893.

(*c*) *Dimech* v. *Corlett* (1858), 12 Moore P. C. 199; *Tarrabochia* v. *Hickie* (1856), 1 H. & N. 183; *McAndrew* v. *Chapple* (1866), 1 L. R. C. P. 643; *Clipsham* v. *Vertue* (1843), 5 Q. B. 265. And see Article 30, *post*. The common "cancelling clause," by which the charterer has the option of cancelling the charter if the ship is not ready to load by a certain day, appears to go no further than a clause "ready to load by" a certain date, compliance with which would be a condition precedent. The "cancelling clause" may be so strict as to give neither party an option, as in *Adamson* v. *Newcastle Association* (1879), L. R. 4 Q. B. D. 462.

(*d*) *Vide ante*, Article 23, Case 1, p. 51 (1863), 3 B. & S. 751. *Behn* v. *Burness* (1863) came before the Exchequer Chamber as a test case to decide whether *Ollive* v. *Booker* (1847), and *Glaholm* v. *Hays* (1841), or *Dimech* v. *Corlett* (1858), were good law, assuming them to contradict each other. The Court held both to be good law, treating *Dimech* v. *Corlett* as the application of *Ollive* v. *Booker* to a set of very special facts. *Sharp* v. *Gibbs* (1857), 1 H. & N. 801, also turns on very special facts.

(*e*) *Ollive* v. *Booker* (1847), 1 Exch. 416.

(*f*) *Corkling* v. *Massey* (1873), L. R. 8 C. P. 395.

(*g*) *Oliver* v. *Fielden* (1849), 4 Exch. 135. For meaning of "leave not later than all March," see *Van Baggen* v. *Baines* (1854), 9 Ex. 523.

(*h*) *Glaholm* v. *Hays* (1841), 2 M. & G. 259.

(*i*) *Deffel* v. *Brockelbank* (1817), 4 Price, 36. See also *Davidson* v. *Gwynne* (1810), 12 East, 381.

on or before December 15, the charterers to have the option of cancelling or confirming the charter." Through dangers of the sea, the steamer, though at X., was not free of pratique by December 15, and the charterers cancelled. *Held*, that the clause as to excepted perils did not prevent them from so doing (*k*).

Case 8.—A ship was chartered on February 24, from X. to Y., and thence to Z. The charter described her as (1) coppered A 1 of X.; (2) now at anchor in this port, and contained a clause (3) that she should "proceed with all convenient speed." At the execution of the charter, the ship (1) was not coppered and had no class on the register; (2) was not at anchor in the port, being then coppered as a new vessel in dry dock; and (3) did not leave X. till March 30. The charterer was at X. and knew of the delay, but did not repudiate the charter. *Held* (1) that "A 1 coppered" referred to the date of sailing, and not to the date of the charter (*l*). (2) That "now at anchor in the port" was too unimportant to be made a condition precedent, unless it could be shown that the object of the charter had been frustrated by its untruth. (3) That the term "to sail with all convenient speed," though undoubtedly broken, could not be treated as a condition precedent (*m*), since the charterer knew of its breach, and did not throw up the charter (*n*).

Case 9.—A ship was chartered on March 15, the charter reciting that it was executed on February 6, and containing the clause "that the ship should proceed from X., where she then lay, on or before February 12." *Held*, if the clause had been possible to have been performed at the time of execution, it was a condition precedent, but here, when the charter was executed, the stipulation had become impossible and therefore nugatory, and not a condition precedent (*o*).

Article 28.—*Conditions implied in the Contract.*

In all contracts for the carriage of goods by sea, there are implied, in the absence of express stipulation to the contrary, the following undertakings by the shipowner or carrier:—

(1.) That his ship is seaworthy (*p*).

(*k*) *Smith* v. *Dart* (1884), 14 Q. B. D. 105. See also *Croockewit* v. *Fletcher* (1857), 1 H. & N. 893. The excepted perils would protect the shipowner from an action by the charterer.

(*l*) No opinion was expressed as to whether it was a condition precedent. The class on the register would certainly be so: whether "coppering" was so or not, would probably depend on the nature and length of the voyage.

(*m*) It would have been otherwise had there been a named day: *Ollive* v. *Booker*; *Glaholm* v. *Hays*, *vide supra*; or if the delay had frustrated the commercial adventure: *Jackson* v. *Union Marine Insurance Company* (1874), L. R. 10 C. P. 125. And see Article 30, *post*.

(*n*) *Dimech* v. *Corlett* (1858), 12 Moore P. C. 199. Commented on in *Behn* v. *Burness* (1863), 3 B. & S. 751, 760.

(*o*) *Hall* v. *Cazenove* (1804), 4 East, 477. See also *Dixon* v. *Heriot* (1862), 2 F. & F. 760; but *per contrà* Parke, B., in *Ollive* v. *Booker* (1847), 1 Exch. 416. "The averment of the fact that the charterer knew of the inaccuracy of the charter at the time of signing it was immaterial."

(*p*) *Steel* v. *State Line SS. Co.* (1877), L. R. 3 App. C. 72, *et vide sub.* Article 29.

(2.) That his ship shall commence and carry out the voyage contracted for with reasonable diligence (*q*).

(3.) That his ship shall carry out the voyage contracted for without unnecessary deviation (*r*).

Such breaches of these undertakings as defeat the commercial purpose of the voyage will justify the hirer of the ship or the owner of the goods carried, in repudiating the contract to carry (*q*). Such breaches as do not defeat the commercial purpose of the voyage will give rise to an action for damages (*s*). The exceptions in a charter or bill of lading do not prevent the application of any of these undertakings, unless they are clearly intended so to do (*t*).

Article 29.—Undertaking of Seaworthiness.

A shipowner by contracting to carry goods in a ship, in the absence of express stipulation (*u*) impliedly undertakes that his ship is seaworthy (*v*).

The seaworthiness required is relative to the particular voyage contracted for, being different for summer or for winter voyages, for river and lake, or for sea navigation (*x*), and varies with the particular cargo contracted to be carried (*y*).

The undertaking is not merely that the shipowner will do and has done his best to make the ship fit, but that the ship really is fit to undergo the perils of the sea and other

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(*q*) *Jackson* v. *Union Marine Insurance Co.* (1874), L. R. 10 C. P. 125, *et vide sub.* Article 30.

(*r*) *Scaramanga* v. *Stamp* (1880), L. R. 5 C. P. D. 295, *et vide sub.* Articles 99, 100.

(*s*) *Clipsham* v. *Vertue* (1843), 5 Q. B. 265.

(*t*) *The Glenfruin* (1885), 10 P. D. 103; *Smith* v. *Dart* (1884), L. R. 14 Q. B. D. 105.

(*u*) See note, *post*, p. 60.

(*v*) *Steel* v. *State Line Steamship Co.* (1877), L. R. 3 App. C. 72; *The Marathon* (1879), 40 L. T. 163; *Cohn* v. *Davidson* (1877), L. R. 2 Q. B. D. 455; *Kopitoff* v. *Wilson* (1876), L. R. 1 Q. B. D. 377; *Lyon* v. *Mells* (1804), 5 East, 428.

(*x*) *Daniels* v. *Harris* (1874), L. R. 10 C. P. 1; *Annen* v. *Woodman* (1810), 3 Taunt. 299.

(*y*) *Stanton* v. *Richardson* (1875), 45 L. J 78 (H. L.); *Tattersall* v. *National Steamship Co.* (1884), L. R. 12 Q. B. D. 297; *The Marathon*, *vide supra.*

incidental risks to which she must of necessity be exposed in the course of the voyage (*z*).

This seaworthiness must exist not only at the commencement of loading, but also at the time of sailing from the port of loading, and it then includes an undertaking that the stowage is fit and proper for the proposed voyage (*a*).

If the charterer or shipper discovers the unseaworthiness before commencing the voyage, and the ship cannot be made seaworthy in a time which it is reasonable, under the circumstances, that the charterer or shipper should wait, he may throw up the contract of hire or carriage (*b*).

If unseaworthiness arises in the course of the voyage, and the shipowner has an opportunity to repair it, he is bound to repair before proceeding on the voyage, but cannot require the charterer or shipper to wait more than a reasonable time for that purpose (*c*).

The shipowner will be liable in damages for loss caused by: (1) unseaworthiness at starting, unless he is expressly protected from such liability by exceptions in the charter or bill of lading (*d*); (2) unseaworthiness on the voyage, not covered by exceptions, even though he has no opportunity to repair it; (3) unseaworthiness on the voyage, though covered by exceptions, which he has an opportunity to repair, if he proceed without repairing (*e*).

This implied undertaking arises not from the shipowner's position as a common carrier, but from his acting as a shipowner (*f*).

Note 1.—In time policies of insurance there is no implied

(*z*) *Steel* v. *State Line Co.*, *vide supra*, at p. 86; *The Glenfruin* (1885), L. R. 10 P. D. 103.

(*a*) *Cohn* v. *Davidson* (1877), *vide supra*.

(*b*) *Stanton* v. *Richardson* (1875), 45 L. J. (H. L.) 78; *Tully* v. *Howling* (1877), L. R. 2 Q. B. D. 182.

(*c*) *Worms* v. *Storey* (1855), 11 Ex. 427; *The Rona* (1884), 51 L. T. 28.

(*d*) For cases where exceptions did not protect him, see *The Glenfruin* (1885), 10 P. D. 103; *The Undaunted* (1886), 11 P. D. 46. See note, *post*, p. .

(*e*) *Worms* v. *Storey*, *vide supra*.

(*f*) *Kopitoff* v. *Wilson* (1876), 1 Q. B. D. 377. A tug owner also impliedly contracts that his tug is properly equipped and supplied with coals: *The Undaunted* (1886), 11 P. D. 46. But see *Robertson* v. *Amazon Tug Co.* (1881), L. R. 7 Q. B. D. 598, negativing an implied contract of efficiency, where the tug is named; the facts there, however, were very unusual.

warranty of *initial* seaworthiness (*g*) owing to the hardship of requiring the shipowner to undertake that his vessel is seaworthy at a time when she is at sea beyond his control, a time at which such policies frequently begin to run. There is also the difficulty of deciding what constitutes seaworthiness for a definite time, but for unknown voyages. These considerations do not apply so strongly to time charters, which usually, though not always, commence with the vessel's starting from port for a known voyage. A time charter, therefore, includes an undertaking of seaworthiness at the beginning of the time. Where several voyages are included in the charter, special provisions are frequently inserted (*h*). In the absence of such provisions, the owner must be held to undertake that his ship is seaworthy on leaving each place where he has an opportunity to repair unseaworthiness (*i*).

Note 2.—*Seaworthy:* that the ship should be in a condition to encounter whatever perils a ship of that kind and laden in that way might be fairly expected to encounter in making such a voyage at such a time of year. Thus, the ship must be properly ballasted and dunnaged (*k*). A ship chartered to carry gunpowder must have the magazine required by the Board of Trade regulations. The shipowner must provide the ship with all necessary documents for the voyage (*l*); but in *Wilson* v. *Rankin* (*m*), the certificate of the port of loading as to stowage, the absence of which did not increase the risk of the voyage, or affect the admissibility of the ship at her port of discharge, was held not an essential to seaworthiness.

Case 1.—F. shipped goods under a bill of lading, which excepted "perils whether or not arising from negligence of A.'s servants, risk of craft or hull, or any damage thereto, &c." Seawater entered through the negligence of some of the crew in leaving a lower port insufficiently fastened. *Held*, that if this were so at the beginning of the voyage the ship was then unseaworthy, and the exceptions of the bill of lading did not protect the shipowner, as they do not apply till the voyage has begun (*n*). That such a bill of lading contained an implied undertaking that the ship was at the time of its departure, reasonably fit for accomplishing the services which the shipowner engages to perform (*o*).

Case 2.—A ship was chartered to proceed to a wharf in the river X.,

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(*g*) *Gibson* v. *Small* (1853), 4 H. L. C. 353.

(*h*) See *Ripley* v. *Scaife* (1826), 5 B. & C. 167; *Havelock* v. *Geddes* (1809), 10 East, 555.

(*i*) *Worms* v. *Storey* (1855), 11 Ex. 427; *The Rona* (1884), 51 L. T. 28.

(*k*) *Vide* Article 49.

(*l*) *Levy* v. *Costerton* (1816), 4 Camp. 389; *Dutton* v. *Powles* (1861), 30 L. J., N. S. Q. B. 169.

(*m*) (1865), L. R. 1 Q. B. 162.

(*n*) In charters, both the carrying voyage, and the chartered voyage, which need not coincide with the carrying voyage; in bills of lading, the carrying voyage: *Hudson* v. *Hill* (1874), 43 L. J. C. P. 273: *Barker* v. *McAndrew* (1865), 18 C. B., N. S. 759.

(*o*) *Steel* v. *State Line Steamship Co.* (1877), L. R. 3 App. C. 72.

and there take on board a cargo, and proceed to Z. She was seaworthy when she began to load, but unseaworthy when she put to sea. *Held*, that the owner undertakes that the ship shall be seaworthy for the intended voyage at the time of her sailing on it. That what is seaworthiness for loading in harbour may be unseaworthiness for the voyage. That the ship may be without any breach of the undertaking, unseaworthy for the voyage while in port, if she is seaworthy for loading, but will break the undertaking, if she leaves port in that condition (*p*).

Case 3.—A ship was chartered to proceed to the East Indies and take on board a cargo of, *inter alia*, wet sugar. The ship was seaworthy for any cargo except wet sugar, for which she had not pumps of sufficient capacity. *Held*, that the charter implied an undertaking that the ship was fit to carry wet sugar, and that, as the ship could not be made fit without a delay unreasonable under the circumstances of the contract, the charterer was justified in throwing up the charter (*q*).

Case 4.—A ship was chartered on March 4, "for twelve months, for as many consecutive voyages as the said ship can enter upon after completion of the present voyage" from X. to Z. When the ship had completed that voyage, she was found to be unseaworthy, and the necessary repairs delayed her for two months. The charterer threw up the charter. *Held*, by the whole Court, that he was justified. By *Brett, J.*, on the ground that the ship was not reasonably fit for the purpose for which she was chartered, and could not be made fit within any time which would not have frustrated the object of the adventure (*r*). *By the rest of the Court* (*s*) on the ground that time was of the essence of the contract, and that the charterer was not bound to accept the ship for a time shorter than or substantially different from that which he had contracted for (*t*).

Case 5.—F. shipped cattle under a bill of lading agreeing that the shipowner was not liable for accidents, disease or mortality, and under no circumstances for more than £5 per animal. The ship, after carrying a cargo of cattle on a previous voyage, was improperly cleaned, and F.'s cattle took foot and mouth disease. *Held*, there was a duty on the shipowner to have the ship reasonably fit for the carriage of the goods he had contracted for, and that, such duty being neglected, the limitations of liability did not apply (*u*).

Case 6.—A ship was chartered "then being tight, staunch and strong," to proceed from X. to Z., "all other unavoidable (*x*) hindrances, dangers and accidents of the seas excepted." She was seaworthy when she started, but became unseaworthy by excepted perils during the voyage, and

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(*p*) *Cohn* v. *Davidson* (1877), 2 Q. B. D. 455; in *Kopitoff* v. *Wilson* (1876), L. R. 1 Q. B. D. 377, in which armour plates broke loose from their stowage and sunk the ship, the question left to the jury was: "Was the ship at the time of sailing in a state, as regards the receiving and stowing of the plates, reasonably fit to encounter the ordinary perils that might be expected at a voyage at that season?"

(*q*) *Stanton* v. *Richardson* (1875), 45 L. J. (H. L.) 78.

(*r*) It seems that this is more in accord with principle than the other view; if time were of the essence of the contract, one day's delay would free the charterer, but the Court recognise the other position in the phrase "a substantially different time."

(*s*) Mellish, L.J., Amphlett, J.A., Kelly, C.B.

(*t*) *Tully* v. *Howling* (1877), L. R. 2 Q. B. D. 182.

(*u*) *Tattersall* v. *National S. S. Co.* (1884), L. R. 12 Q. B. D. 297.

(*x*) *Unavoidable*=Unavoidable by ordinary despatch and diligence. *Granger* v. *Dent* (1829), M. & M. 475.

put into a port, where she could have been repaired. She proceeded to sea without repairs. *Held*, that she was not bound to repair or to proceed, but if she wished to proceed, she must repair, and that the owner was liable for damage on the further voyage, caused by the unseaworthiness of his vessel (*y*).

Case 7.—A vessel was damaged while on her voyage by decks straining, and the master, having an opportunity to repair, proceeded without caulking the decks. In consequence the cargo was damaged. *Held*, that the shipowner was liable for such damage (*z*).

Case 8.—A ship, chartered to carry tea, carried antimony as ballast. The charterers, alleging that the fumes of antimony were prejudicial to tea, refused to load. Antimony in fact was not prejudicial to tea. *Held*, that, the ship being in fact fit to carry the cargo, the fact that there was a general belief that it was unfit was no defence to the charterer (*a*).

Note.—It is not now unusual to find in bills of lading a clause limiting this undertaking to one that due diligence has been used to make the ship seaworthy: *e.g.*, "All the above exceptions are conditional on the ship being seaworthy when she sails on the voyage, but any latent defects in the machinery shall not be considered unseaworthiness, provided the same do not result from want of due diligence of the owners, or any of them, or the ship's husband or manager;" or "It is expressly declared that the company are not liable for loss or damage occasioned by any defects whatsoever in the hull, machinery, or equipment of this vessel . . . whether such defects existed before the commencement of or arose or developed during the voyage, provided all reasonable means have been taken to make the vessel seaworthy" (*b*).

A common Liverpool exception is "unseaworthiness of the vessel at the commencement of the voyage, provided all reasonable means have been taken to provide against the same." A few bills go so far as even to negative liability even for unseaworthiness caused by negligence, *e.g.*, "In accepting this bill of lading the shipper expressly agrees that the steamer is seaworthy and reasonably fit for the carriage of the cargo herein contracted to be carried (*c*), at the time of starting on the voyage, and under no circumstances is such seaworthiness or fitness to be questioned;" and, again, "not liable for act, neglect, or default of any person or persons in providing, despatching, and navigating the ship."

(*y*) *Worms* v. *Storey* (1855), 11 Ex. 427.

(*z*) *The Rona* (1884), 51 L. T. 28.

(*a*) *Towse* v. *Henderson* (1850), 4 Ex. 890.

(*b*) These two exceptions bear the mark of *The Glenfruin* (1885), L. R. 10 P. D. 103.

(*c*) This bears the mark of *Tattersall* v. *National S.S. Co.* (1884), L. R. 12 Q. B. D. 297.

Article 30.—*Undertaking of reasonable Despatch.*

The shipowner impliedly undertakes that his vessel shall be ready to commence the voyage agreed upon, and to load the cargo to be carried, and shall proceed upon and complete the voyage agreed upon, in a time which is reasonable having regard to the charterer's or shipper's voyage or adventure (*d*), *i.e.*, in such a time that in a commercial sense the commercial speculation entered into can be carried out (*e*).

If this implied undertaking is rendered impossible of performance by obstacles not known to the parties when they entered on the charter (*f*), and which cannot be removed within a reasonable time as defined above, the charterer or shipowner may throw up the charter (*g*); the shipowner or shipper may repudiate the contract contained in the bill of lading (*h*).

If the obstacle to performance is one of the excepted perils, no action will lie against either party for the failure to perform the contract. If the obstacle is not covered by the exceptions, an action will lie against the party failing to perform the contract.

If the delay, though unreasonable, is not such as to frustrate the commercial purpose of the adventure, it will be a ground for an action for damages, but will not justify the repudiation of the charter (*i*).

Case 1.—A ship was chartered in November, 1871, to proceed with all possible despatch, dangers and accidents of navigation excepted, from Liverpool to Newport, and there load iron for San Francisco. She sailed from L. for N. on January 2, 1872, and stranded on the way on January 3. The repairs required took till the end of August. On February 15, the

(*d*) *Jackson* v. *Union Marine Insurance Co.* (1874), L. R. 10 C. P. 125; *Tully* v. *Howling* (1877), L. R. 2 Q. B. D. 182, *dicta* of Judges in *Rankin* v. *Potter* (1872), L. R. 6 H. L. 83; *McAndrew* v. *Adams* (1834), 1 Bing. N. C. 29; *Fowler* v. *Knoop* (1878), L. R. 4 Q. B. D. 299 (unloading). See also *Donaldson* v. *Little* (1882), 10 C. of S. Cases 413; *Mackenzie* v. *Liddell* (1883), *ibid.* 705 (*Sc.*)

(*e*) See note 1.

(*f*) *Medeiros* v. *Hill* (1832), 8 Bing. 231.

(*g*) *Jackson* v. *Union Marine Insurance Co.* (1874), *vide supra*; *Geipel* v. *Smith* (1872), L. R. 7 Q. B. 404.

(*h*) See note 2.

(*i*) *Clipsham* v. *Vertue* (1843), 5 Q. B. 265; *Tarrabochia* v. *Hickie* (1856), 1 H. & N. 183; *McAndrew* v. *Chapple* (1866), L. R. 1 C. P. 643.

charterers threw up the charter. The jury found that the time necessary for getting the ship off and repairing her was so long as to put an end in a commercial sense to the commercial speculation entered upon by the shipowner and charterer. *Held*, that the charterer was justified under the circumstances in throwing up the charter, though as the delay arose from excepted perils he had no action against the shipowner (*k*).

Case 2.—A ship was chartered to fetch ice from Norway in March, to be delivered in June; owing to delay from perils of the sea she cannot arrive in Norway till August, or at her final destination till November. *Submitted*; the charterer may throw up the charter (*l*).

Case 3.—A ship was chartered to proceed to Z. with all convenient speed, with an exception of "restraint of princes." Before anything had been done under the charter, the French Government declared Z. blockaded. *Held*, that the shipowner was only bound to wait a reasonable time for the removal of such an obstacle, and as it was likely to continue so long as to defeat the object of such a commercial adventure, the shipowner was justified in throwing up the charter, and in refusing to load at all, though the loading was not prevented by the blockade of Z. (*m*).

Case 4.—A ship was chartered as "bound to Nantes," to load at Nantes and proceed to Z. Before proceeding to Nantes, the ship went to Newcastle. The charterer alleged unreasonable delay, and refused to load. *Held*, that such an allegation was only a ground for an action for damages, and would not support a repudiation of the charter, unless it was also alleged that the delay frustrated the object of the voyage (*n*).

Case 5.—A ship was chartered "with all convenient speed, having liberty to take an outward cargo for owner's benefit, direct on the way, to proceed to X. and there load a full cargo." The ship deviated to Y. which was not "direct on the way" to X., and arrived at X. a few days late. The charterer refused to load. It was admitted that the object of the voyage was not frustrated, and the whole Court *held*, that the charterer was not entitled to repudiate the charter, but had his remedy in damages (*o*).

Case 6.—Owing to the delay of the master of a ship, who omitted to take on board provisions and stores while the cargo was loading, the ship was detained after her loading was completed, so that the harbour froze and she was ice-bound for the winter. *Held*, that the shipowners were liable for the damage resulting from such delay (*p*).

Case 7.—A ship was chartered on October 20, to go in ballast to X., and bring back a cargo of fruit direct to Z.; if the vessel did not arrive at X. by January 31, the charterer was to be at liberty to cancel the charter. The ship did arrive before January 31, but made an intermediate voyage before so doing. *Held*, that the charterer was entitled to throw up the

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(*k*) *Jackson* v. *Union Marine Insurance Co.* (1874), L. R. 10 C. P. 125. See also *Tully* v. *Howling* (1877), L. R. 2 Q. B. D. 182.

(*l*) On authority of *Jackson* v. *Union Marine Insurance Co. vide supra*, see per Bramwell, B., pp. 141, 143, 146. *Touteng* v. *Hubbard* (1802), 3 B. & P. 291, must be taken as overruled so far as it contradicts Case 2.

(*m*) *Geipel* v. *Smith* (1872), L. R. 7 Q. B. 404.

(*n*) *Clipsham* v. *Vertue* (1843), 5 Q. B. 265. See also *Tarrabochia* v. *Hickie* (1856), 1 H. & N. 183.

(*o*) *McAndrew* v. *Chapple* (1866), L. R. 1 C. P. 643. See also *Bornmann* v. *Tooke* (1808), 1 Camp. 377. But see *Freeman* v. *Taylor* (1831), 8 Bing. 124, where six weeks' delay and deviation on the outward voyage, found by the jury to frustrate the object of the charter, was *held* to put an end to the charter.

(*p*) *The Wilhelm* (1866), 14 L. T. 636.

charter, the implied undertaking to proceed with reasonable speed having been broken (*q*).

Note 1.—The case of *Jackson* v. *Union Marine Insurance Co.* (*r*) has never been formally approved by the House of Lords, though Lord Blackburn in *Dahl* v. *Nelson* said (*s*): "There was a dissenting minority" [*i.e.*, Cleasby, B.], "in that case, and some previous authorities are perhaps not quite consistent with it. It is no doubt competent to your Lordships to reconsider that case, and decide contrary to it; I think it was rightly decided." In the same case Lord Watson said (*t*): "I adopt the view of Brett, L.J. (*u*), that the shipowner must bring his ship to the primary destination named in the charter, unless he is prevented from getting his ship to that destination by some obstruction or disability of such a character that it cannot be overcome by the shipowner by any reasonable means, except within such a time as having regard to the adventure of both the shipowner and the charterers is as a matter of business wholly unreasonable." It was also cited without disapproval by Lord Selborne and Lord Watson in *Inman* v. *Bischoff* (*x*), and may therefore be accepted as established law.

Whether there is either a day named in the charter by which performance must be commenced or completed, or a general stipulation expressed in the charter, such as "with all possible despatch, certain perils excepted," there will also be held to be an implied undertaking to proceed "in time reasonable for the commercial adventure." Failure in the express stipulation, but compliance with the implied one, will in the case of a named day justify the charterer in repudiating the contract, in the case of a general stipulation will give him only an action for damages (*y*). Compliance with the express stipulation, but failure in the implied one, would entitle the charterer to repudiate (*z*).

The three cases relied on by Cleasby, B., in his dissenting judgment (*a*) in *Jackson's Case*, cannot be relied on as law so far as they conflict with this.

In *Hadley* v. *Clarke*, F. shipped goods by A.'s ship "to be carried from Liverpool to Leghorn;" when the cargo was loaded

(*q*) *McAndrew* v. *Adams* (1834), 1 Bing. N. C. 29 (a good example of the double undertaking, express and implied).
(*r*) L. R. 10 C. P. 125 (1874).
(*s*) (1881) L. R. 6 App. C. 38, 53.
(*t*) L. R. 6 App. C. 38, 59, 60.
(*u*) 12 Ch. D. at p. 593.
(*x*) L. R. 7 App. C. 670, 676, 689 (1882). See also *Rankin* v. *Potter* (1872), L. R. 6 H L. 83, 104, 113, 117, 133.
(*y*) *Jackson* v. *Union Marine Insurance Co.*, *vide supra*, *Clipsham* v. *Vertue* (1843), 5 Q. B. 265.
(*z*) *McAndrew* v. *Adams* (1834), 1 Bing. N. C. 29.
(*a*) *Hadley* v. *Clarke* (1799), 8 T. R. 259; *Touteng* v. *Hubbard* (1802), 3 B. & P. 291; *Hurst* v. *Usborne* (1856), 18 C. B. 144.

and the voyage had begun, an embargo was laid on the ship at Falmouth, which detained her for two years, and it was held that such an embargo only suspended and did not dissolve the contract between the parties. There was here no finding by the jury that the object of the adventure was frustrated. It is difficult to imagine a modern jury finding that two years' delay did not put an end to the commercial adventure; and in *Geipel* v. *Smith* (1872) (*b*), the shipowner was allowed to repudiate under circumstances much less strong.

In *Touteng* v. *Hubbard* a ship was chartered for a voyage to St. Michael's for fruit; and she was delayed by an embargo till the fruit season was over. The case really turned on the nationality of the vessel, but the judges, following *Hadley* v. *Clarke*, said *obiter* that the merchant would have been under the necessity of furnishing the ship with a cargo if she had arrived at St. Michael as soon as she conveniently could after the raising of the embargo, though the fruit season was over.

In *Hurst* v. *Usborne*, a ship was chartered to proceed to X. for grain or other lawful merchandise; she did not arrive at X. till the export trade in grain was over; evidence as to the state of the corn trade was *held* inadmissible (*c*).

In *Jackson* v. *Union Marine Insurance Co.* (*d*), Bramwell, J., delivering the judgment of the majority of the Court, expressed disapproval of the two latter cases. As to *Touteng* v. *Hubbard*, he pointed out that the *dicta* cited were *obiter*, and said, "I cannot think that it would have been so held, had it been necessary to act upon it," proceeding to put cases showing the unfortunate results of such a decision; while, as to *Hurst* v. *Usborne*, he was more decided, and said: "I think it is unsatisfactory, and, if a decision on the question now before us, wrong."

None of these cases therefore can be now taken as authorities in any way contradicting the implied undertaking of the shipowner to carry out the voyage in a time which is reasonable, having regard to the commercial adventure concerned. Though there are few cases as to the effects of unreasonable delay in the carrying voyage, it seems clear that the principle covers this as well as delay before loading; such cases would naturally be less frequent, as, if the shipowner wishes to repudiate, he, or his captain, must still act for the time as the agent of the cargo-owners and for the benefit of the goods, while the cargo-owner is also under the necessity of taking the cargo, if he repudiates.

Note 2.—The question has, it is believed, never arisen as to bills of lading, but it is submitted that a shipper who had shipped his goods would be entitled to demand them back if the

) L. R. 7 Q. B. 404.

(*c*) There is also *The Newport* (1858), Swabey, 335, a decision of Mr. Registrar Rothery, following *Hadley* v. *Clarke*, *vide supra*, and holding that a detention of three years by capture only temporarily suspended the contract.

(*d*) L. R. 10 C. P. 125, at pp. 146, 147.

ship did not sail within a reasonable time as defined above, or if being unseaworthy she could not be made seaworthy within a reasonable time; or if on the voyage, the ship was detained, as by a blockade, an unreasonable time,

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Implied contract to proceed without deviation or delay.
(*See Articles* 99, 100.)

Article 31.—*Implied undertaking by Shipper not to ship dangerous Goods without Notice.*

By the common law of England (*e*) the shipper of goods impliedly undertakes to ship no goods of such a dangerous character or so dangerously packed, that the shipowner or his agent could not by reasonable knowledge and diligence be aware of their dangerous character, without notice to the shipowner or his agent of such dangerous character; and he is therefore liable to any person who is injured by the shipment of such dangerous goods without notice (*f*).

But when the shipowner or his agent has full opportunities of observing the dangerous character of such goods, he is treated as having such notice, and the shipper is not therefore liable (*g*).

Quære, whether the shipper's undertaking is an absolute one to ship no dangerous goods without notice (*h*), or merely an undertaking to use due diligence to avoid such shipment (*i*).

(*e*) Certain special goods are also dealt with by statutory penalties: see 36 & 37 Vict. c. 85, ss. 23–27; 38 & 39 Vict. c. 17, ss. 33, 34, 36, 39, 43 (Explosives): see Appendix III. All bills of lading contain special provisions as to risky or hazardous goods, *e.g.*, glass, specie, &c.

(*f*) *Brass* v. *Maitland* (1856), 6 E. & B. 470; *Hutchinson* v. *Guion* (1858), 5 C. B., N. S. 149; *Williams* v. *East India Company* (1802), 3 East, 192, at pp. 200, 201; *Farrant* v. *Barnes* (1862), 31 L. J. C. P. 137: in which see *dictum*, *per* Willes, J., at p. 139.

(*g*) *Acatos* v. *Burns* (1878), L. R. 3 Ex. D. 282, which seems thus reconcileable with *Brass* v. *Maitland* and other cases, though some of its *dicta* are more sweeping.

(*h*) As laid down by Campbell, C.J., and Wightman, J., in *Brass* v. *Maitland*.

(*i*) As laid down by Crompton, J., in *Brass* v. *Maitland*, and apparently by Brett, L.J., in *Acatos* v. *Burns*, where he says, "There is no warranty that the goods shipped have no concealed defects at the time of shipment." This alternative, in view of the findings of the jury in *Acatos* v. *Burns*, and the judgment of the Court therein, is possibly the correct view.

Case 1.—F. shipped on board A.'s ship sixty casks described as "bleaching powder," apparently sufficiently packed; in fact the powder contained chloride of lime, which corroded the casks, and damaged the rest of the cargo. *Held*, that, in the absence of notice to A. of the dangerous character of the goods, F. was liable for the resultant damage, unless the powder was such a well-known article that masters of ships ought to know of its dangerous character. F. pleaded that he shipped the goods, packed as he received them from third persons, without negligence. *Held*, by Lord Campbell and Wightman, J., no defence; by Crompton, J., a good defence (*k*).

Case 2.—A., shipowners, received for shipment from F., a quantity of salt cake with permission to stow it in bulk. In ignorance of its nature, they stowed it next casks, which it corroded, letting out the brine they contained, which damaged the salt cake. F. sued A. for negligent stowage. *Held*, that proof that F. concealed the dangerous nature of salt cake from A., and that it would not be known to masters in the ordinary course of business, was a good defence. *Held*, also, that the mere fact that F. authorized stowage in bulk was no defence, as he did not authorize negligent stowage in bulk (*l*).

Case 3.—F. shipped maize in A.'s ship, apparently in good order and condition; on the voyage it sprouted and was evidently in bad condition and dangerous. The jury found that it was dangerous when shipped; but that its state could not have been ascertained by the use of reasonable means, and that the shipowner had full opportunities of examining it. *Held*, that F. was not liable for any damage or delay occasioned by such shipment (*m*).

(*k*) *Brass* v. *Maitland* (1856), 6 E. & B. 470.

(*l*) *Hutchinson* v. *Guion* (1858), 5 C. B., N. S. 149.

(*m*) *Acatos* v. *Burns* (1878), L. R. 3 Ex. D. 282. On these findings, the decision of the Court appears to overrule part of the decision in *Brass* v. *Maitland* in favour of the view of Crompton, J.

SECTION IV.

PERFORMANCE OF CONTRACT: LOADING.

Article 32.—Performance of Contract before Loading.

UNDER the contract of affreightment whereby the whole of a ship is hired, contained in a charterparty, the shipowner may have duties to perform before the cargo is loaded; under the contract of affreightment, whereby goods, not a complete cargo, are to be carried, evidenced in a bill of lading only, as the bill of lading is not signed till the goods are shipped, such bill of lading does not usually provide for anything previous to shipment (*a*).

Article 33.—Shipowner's Duty under a Charter before loading: "To proceed to a Port and there load."

If the chartered voyage is not the same as the carrying voyage, as in a charter "to proceed to a port and there load," the shipowner's first duty is to proceed to his port of loading with reasonable speed, and by a fixed day, if such be named in the charter (*b*).

(*a*) Where room is engaged for certain goods in a general ship, but the goods are afterwards "shut out" for want of room, the contract of affreightment is *primâ facie* broken, and an action will lie against the shipowner.

This is subject to the following remarks:—(1.) That many engagements of goods are so indefinite that they could not be held to amount to contracts: though in other cases a formal contract clearly exists, as where the intending shipper makes a note of his goods and sometimes of the rate of freight on the back of one of the ship's shipping cards, and gets it initialled by the shipowner or his broker; (2.) That most shipping cards contain a clause—"last day for goods is . . . ., unless the ship is previously full," a proviso which protects the shipowner from any action for "shutting out"; (3.) That owing to the general course of business and the great difficulty of proving any damages by "shutting out," such actions, which clearly lie at law, are in practice almost unknown.

(*b*) *Jackson* v. *Union Marine Insurance Co.* (1874), L. R. 10 C. P. 125; Brett, L.J., in *Nelson* v. *Dahl*, 12 Ch. D. pp. 581–584 (1879); *McAndrew* v. *Adams* (1834), 1 Bing. N. C. 29. See also *Barker* v. *McAndrew* (1865), 18 C. B., N. S. 759; *Harrison* v. *Garthorne* (1872), 26 L. T., N. S. 508.

The excepted perils in the charter though they apply to this preliminary voyage (*c*) do not prevent the application of either of these undertakings, though they may excuse the shipowner for their breach (*d*).

Case 1.—A ship was chartered on December 28, when lying at U., to proceed forthwith to X. and there load, perils excepted "which may prevent the loading or delivery of the cargoes during the said voyage." Owing to delays caused by excepted perils, the ship did not reach X. till July 28, and the charterers refused to load. The jury found that the delay did not defeat the commercial object of the adventure. *Held*, that "forthwith" meant without unreasonable delay (*e*); that the exceptions in the charter applied to the preliminary voyage to the port of loading; and that the charterers were not justified in throwing up the charter (*f*).

Case 2.—A ship, then at X., was chartered to "proceed to the usual loading place there, guaranteed for cargo in all October, and there load and proceed to Z.," certain perils being excepted "during the voyage." The vessel broke ground to proceed to the usual place of loading, but was prevented by excepted perils from arriving there till after considerable delay. The charterer did not throw up the charter, but sued the shipowner for its breach; the shipowner pleaded excepted perils. *Held*, that the transit to the place of loading was part of the voyage; that the excepted perils applied to it, and that the charterer could not succeed (*g*).

Case 3.—A ship was chartered to go to X. and there load and proceed to Z., certain perils being excepted; "should the ship not be arrived at X. free of pratique and ready to load on or before December 15, charterers to have the option of cancelling charter." Through excepted perils the ship was not free of pratique and ready to load on December 15. *Held*, that the clause as to excepted perils did not apply to the cancelling clause, and that the charterers could therefore throw up the charter (*h*).

Note.—The port to which the ship is to proceed may be named in the charter, in which case the ship is bound to go there,

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(*c*) *Hudson* v. *Hill* (1874), 43 L. J. C. P. 273; *Bruce* v. *Nicolopoulo* (1856), 11 Exch. 129.

(*d*) *Smith* v. *Dart & Son* (1884), L. R. 14 Q. B. D. 105; *Harrison* v. *Garthorne*, *vide supra*.

(*e*) On the meaning of "forthwith," see also *Roberts* v. *Brett* (1865), 11 H. L. C. 337.

(*f*) *Hudson* v. *Hill* (1874), *vide supra*. The ship made her outward voyage by Rio, which ordinarily would be a breach entitling charterer to throw up the charter (*McAndrew* v. *Adams*), but was allowed by a special clause in the charter. The findings of the jury were contradictory and unsatisfactory, and, if the sugar season was over, it is difficult to reconcile some remarks of Brett, J., with the present law. If the jury had found commercial frustration, the charterers could have thrown up the charter, but the shipowner would have been protected from an action by the exceptions.

(*g*) *Barker* v. *McAndrew* (1865), 18 C. B., N. S. 759. Willes, J., in his judgment distinguishes *Crow* v. *Falk* (1846), 8 Q. B. 467, and *Valente* v. *Gibbs* (1859), 6 C. B., N. S. 270, as cases where there was no preliminary voyage, and the delay therefore arose before the "voyage" began; but some *dicta* of Cockburn, C.J., in the latter case seem to go too far in the present state of the authorities.

(*h*) *Smith* v. *Dart* (1884), L. R. 14 Q. B. D. 105.

usually protected by the clause "or as near as she can safely get;" or it may be left to the charterer to name, being "a port as ordered"—the shipowner being sometimes protected by its description as a "safe port."

Article 34.—"*To proceed to a safe Port.*"

A "safe port" means not only a port naturally safe, or a port into which the vessel can go safely as a laden ship, without danger from physical causes (*i*), but also one into which she and her cargo can go without danger from political causes (*k*).

The port must not only be safe when the ship is ordered to it, but also safe when the ship arrives at it (*l*). If the port is not safe at the time of order, the shipowner may refuse to start for it (*m*); if it becomes unsafe before arrival there, he may require another port to be named (*l*).

Case.—A German vessel was chartered to proceed to Y., "where she shall receive orders from charterer's agent within three days of arrival to proceed to any one safe port in Great Britain or on the Continent between Havre and Hamburg"; at Y. the ship was ordered to Dunkirk, then a safe port; before reaching Dunkirk war broke out between France and Germany, rendering it unsafe for the ship to enter Dunkirk; she therefore proceeded to Dover. *Held*, that the shipowner was entitled to call upon the charterer at Dover to name a safe port for delivery, and, failing his doing so, was entitled to full freight at Dover (*l*).

Article 35.—"*To proceed to a Port as ordered.*"

Where a ship is chartered to proceed to a "port as ordered," the master is bound to wait a reasonable time for such orders, but need not, in the absence of express stipulation, communicate with the charterers. If he receives no orders within a time commercially reasonable, he may either proceed to such a place as a prudent man would think most to the charterer's advantage, or may throw up the charter (*n*).

(*i*) *The Alhambra* (1881), L. R. 6 P. D. 68. See also article 37.
(*k*) *The Teutonia* (1872), L. R. 4 P. C. 171, at pp. 181, 182; *Ogden* v. *Graham* (1861), 1 B. & S. 773.
(*l*) *The Teutonia, vide supra.*
(*m*) *The Alhambra, vide supra.*
(*n*) *Sieveking* v. *Maas* (1856), 6 E. & B. 670; *Woolley* v. *Reddelien* (1843), 5 M. & G. 316; *Rae* v. *Hackett* (1844), 12 M. & W. 724.

Note.—**In practice the master always does inform the charterers of his arrival, and there is usually an express stipulation to that effect in the charter: *e.g.*, "to call at Y. for orders to be forwarded within forty-eight hours after notice of her arrival has been given to and received by charterer's agents in London or lay days to count."**

Case.—A ship was chartered to proceed to X. and there load timber "to a coal port or a good and safe port on the Firth of Forth, or to London, or to a good and safe port on the east coast of Great Britain as ordered at Y." She loaded at X. and proceeded to Y. for orders; she received no orders there, so, after waiting a reasonable time, proceeded to Leith, "a good and safe port on the Firth of Forth," and then discharged. *Held*, that in the absence of orders the master was justified in proceeding after a reasonable time, and was not bound to communicate with the charterers; that in such a case he should [might?] go to the place to which he thought it would be most to the advantage of the charterer to go (*o*).

Article 36.—"*So near as she can safely get.*"

A ship chartered to load or unload at a named port or dock, "or so near as she can safely get," if prevented on her arrival from reaching the place of loading or unloading is bound to wait a reasonable time before adopting the alternative place of loading or discharge, if by so waiting she can get to the place itself of loading or unloading (*p*).

This reasonable time will be fixed by commercial considerations, and by the nature of the voyage in which the ship is engaged (*q*). Thus in tidal rivers or harbours she is usually bound to wait till ordinary spring tides (*r*); in ice-bound rivers or seas, till the ice melts (*s*); in case of delay by

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(*o*) *Sieveking* v. *Maas*, *vide supra*. Lord Campbell's remarks in this case seem inconsistent with *Rae* v. *Hackett*, *vide supra*, where charterer's failure to name a port was held to justify the shipowners in not proceeding; but there the port to be named was the port of loading; in this case, the port of discharging, and all it was necessary to decide was that the shipowner was not liable to an action for proceeding without orders. I have however altered Lord Campbell's "should" to "may," to cover the two cases.

(*p*) *Dahl* v. *Nelson* (1881), L. R. 6 App. C. 38.

(*q*) *Per* Lord Blackburn, 6 App. C. p. 54: "What would be the effect on the object of the contract, and the damage to each party caused by the delay." *Per* Brett, L. J., 12 Ch. D. p. 593: "Notice must be taken of what the particular adventure in each case is."

(*r*) *Parker* v. *Winlow* (1857), 7 E. & B. 942; *Bastifell* v. *Lloyd* (1862), 1 H. & C. 388. *Schilizzi* v. *Derry* (1855), 4 E. & B. 873.

(*s*) *Schilizzi* v. *Derry*, *vide supra*, at p. 886; *Metcalfe* v. *Britannia Iron Works* (1877), L. R. 2 Q. B. D. 423: and see *per* Brett, L.J., 12 Ch. D. at p. 593.

fulness of docks, a time reasonable from a commercial point of view (*t*).

If wholly unexpected circumstances, such as a war, or a blockade intervene, the clause will not protect the master in delivering at the nearest safe port and claiming his freight, though such a course may be a reasonable one for him to take (*u*).

Case 1.—A ship was chartered to proceed "to the Z. Docks, or so near thereto as she can safely get." She reached the dock gates on August 4; but the docks were quite full, though application had been made on the ship's behalf on July 16, and at least five weeks would elapse before the ship could be discharged. *Held*, that the shipowner was bound to wait a reasonable time to go into the docks, but that if he could only go in by waiting an unreasonable time, he was entitled to call upon the charterer to take delivery outside the dock gates at charterer's expense. *Held*, also, that the delay required to enter the docks in this case was unreasonable (*t*).

Case 2.—A ship was chartered to proceed to a berth within certain limits in the port of Plymouth or "so near as she could safely get." She could not at neap tides get to the berth named but could at spring tides. She arrived at neap tides. *Held*, that she must wait till spring tides; the delay by tides in a tidal harbour being in the ordinary and regular course of navigation (*v*).

Case 3.—Ship chartered "to Galatz, or so near thereto as she should safely get." She reached the mouth of the Danube, ninety-five miles from G., on November 5, but there was not then enough water to enable her to cross the bar: she remained there till December 11, when the anchorage was no longer safe, and she accordingly proceeded to Odessa, the nearest safe port. There was water enough on the bar on January 7. *Held*, there had been no performance of the charter; the rising of the Danube at the beginning of the year being a well-known incident in Danube navigation, the master was bound to wait. The vessel was bound to get within the ambit of the port before discharging, though she might not reach the actual harbour (*x*).

Case 4.—Charter "to Taganrog, or so near as she could safely get and deliver the cargo afloat." On arriving at Kertch, three hundred miles by sea, seven hundred by land, from T. the ship was prevented by ice from entering the Sea of Azof. She claimed under the clause to deliver at

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(*t*) *Dahl* v. *Nelson* (1881), L. R. 6 App. C. 38.

(*u*) *Castel Latta* v. *Trechmann* (1884), 1 C. & E. 276. But this is now frequently provided for by express clauses. See note, p. 72. But if there is no prospect of the removal of the obstacle within a reasonable time, the master or shipowner can throw up the contract: *Geipel* v. *Smith* (1872), L. R. 7 Q. B. 404. In that case he will still have the duty of providing for the cargo in the way most beneficial to its owner (see Articles 95, 101), and he will be entitled to recover any expenses incurred in so doing: *Cargo ex Argos* (1873), L. R. 5 P. C. 134, and Articles 101, 138, *post*. It does not, of course, follow that the nearest safe port, though possibly the most convenient to the shipowner, is the port most beneficial to the cargo-owner.

(*v*) *Parker* v. *Winlow* (1857), 7 E. & B. 942. See also *Bastifell* v. *Lloyd* (1862), 1 H. & C. 388. *Per* Bramwell, B., "it would be different if there were only one or two tides in the year."

(*x*) *Schilizzi* v. *Derry* (1855), 4 E. & B. 873. Lord Campbell, p. 886, compared detention by insufficient water to detention by ice.

Kertch. *Held*, this was not a delivery under the charter, the obstruction being only temporary, and such as must be incident in every voyage to a frozen sea (*y*).

Case 5.—Charter "to Taganrog, or so near as she may safely get." Owing to Turkish blockade the ship was unable to reach T., and accordingly proceeded to Constantinople, the nearest safe port, and claimed to deliver her cargo there. *Held*, not a delivery under the charter, the clause being intended to meet the case of the ship not being able absolutely to get to the very place or dock stipulated, but not enabling the vessel to go to any port, which under the circumstances it is a reasonable course for the master to go to (*z*).

Note.—The question of the disposition of the cargo on bills of lading or charters, where the vessel is prevented from reaching her port of destination is now often dealt with by clauses of this kind:—"In case of the blockade or interdict of the port of destination, or if without such blockade or interdict the entering of the port of discharge should be considered unsafe by reason of war, infectious disorder, quarantine, disturbances, ice, or from any other cause, the master to have the option of landing the goods at any other port he may consider safe, at shipper's risk and expense, when the ship's responsibility shall cease;" or:—"when the navigation of the continental ports is obstructed by ice, the goods to be landed at the nearest available port at the risk and expense of the consignor, such delivery being considered final," or:—

"Should hostilities render it unsafe for the steamer or her cargo to proceed to the port of destination, she has liberty to discharge her cargo at any near available port, and there end her voyage, giving shippers due notice of such fact."

This power is sometimes given the master "in case of apprehension of such prevention, or in case of war or hostilities rendering the further prosecution of the voyage in the opinion of the master or owners unsafe." Without such clauses as these, though the master might delay or deviate to avoid danger, he could not land the goods or give up the intention of proceeding to the original port of destination, at any rate till such delay had ensued as to defeat the commercial purpose of the adventure; *semble*, even then he would not be entitled to freight; though he might be entitled to the expenses of delivery. (See Articles 138, 139, 143.)

Article 37.—"*Safely.*"

"Safely" means "safely as a laden ship (*a*)." The ship is not therefore bound to load part of her cargo in the port, and

(*y*) *Metcalfe* v. *Britannia Iron Works* (C.A.) (1877), L. R. 2 Q. B. D. 423.
(*z*) *Castel* v. *Trechmann* (1884), 1 C. & E. 276 (Stephen, J.), see note (*u*), *ante*.
(*a*) *Shield* v. *Wilkins* (1850), 5 Ex. 304.

then take on board outside the port the part of the cargo she could not safely load in port (*b*). Neither is she bound to unload before reaching the port, to enable herself to proceed to a port she could not reach in safety at her laden draught of water (*c*).

Case 1.—A ship was chartered "to a safe port as ordered, or as near thereto as she can safely get, and always lay and discharge afloat." The ship was ordered to Lowestoft, where the vessel could not "lie always afloat," without previously discharging some of her cargo outside the port. *Held*, that the shipowner was not bound to go to such a port, but only to one where the vessel in her laden draught of water could always lie afloat safely (*d*).

Case 2.—A ship was chartered to X., "or so near thereto as she can safely get." X. is a bar-harbour; the ship was loaded inside the bar as deep as the water in the bar would allow, and the charterer then required her to complete her loading at her own expense outside the bar. *Held*, that the ship was not required by the charter to do so, for she could not be said to "safely get" to a place, from which she could not safely get away with a full cargo, and her going inside the bar was therefore only for the charterer's accommodation. According to the terms of the charter, she need not have crossed the bar at all (*e*).

Case 3.—A ship was chartered to proceed "to a safe port, or as near thereto as she can safely get, and deliver same . . . to discharge as customary with all possible despatch, cargo to be taken from alongside ship at merchant's risk and expense." She was ordered to Z., but could get no nearer than Y. The shipowner claimed to deliver enough at Y. to lighten his vessel, at charterer's expense; the charterer set up a custom at the port of Z. that the ship must get to Z. at her own expense. *Held*, that the custom was inconsistent with the contract, and the charterer must pay the expense of lightening (*f*).

Note 1.—*At all times of the Tide and always afloat.*—This clause will relieve the ship of the duty of waiting in a tidal river or harbour, till the tides serve her to proceed to the dock or wharf where she is to discharge: under it the charterer will be

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(*b*) *The Alhambra* (1881), L. R. 6 P. D. 68 (C.A.) *Shield* v. *Wilkins* (1850), 5 Ex. 304. See also *Hayton* v. *Irwin* (1879), L. R. 5 C. P. D. 130 (C. A.)

(*c*) *Shield* v. *Wilkins*, *vide supra*.

(*d*) *The Alhambra*, *vide supra*.

(*e*) *Shield* v. *Wilkins*, *vide supra*. If she had not crossed the bar, the charterer must have borne the expense of loading outside by lighters: *Trindade* v. *Levy* (1860), 2 F. & F. 441: but if, having gone inside, she had loaded a full cargo, and been obliged to unload to get out, she must have paid the expense of loading outside, and must carry the full cargo, to earn her freight. *General Steam Navigation Co.* v. *Slipper* (1862), 11 C. B., N. S. 493.

(*f*) *Hayton* v. *Irwin* (1879), L. R. 5 C. P. D. 130. There was no express decision that the ship was bound to proceed to Z. after lightening. It is submitted that she was not, if Y. was outside the port of Z. (*The Alhambra*, *vide supra*), and if Y. was in the port of Z. the lay-days would begin to count from her readiness to unload at Y., in the absence of any custom of the port. *Nielsen* v. *Wait* (1885), L. R. 14 Q. B. D. 516; 16 Q. B. D. 67.

required to name a loading or discharging berth, where she can lie "always afloat at all times of the tide."

Case.—A ship was chartered to Z., "or so near thereto as she may safely get, at all times of tide and always afloat." She arrived at Y., on September 5, but the tides would not allow her to proceed to Z. "always afloat," till September 9. *Held*, that the vessel had "arrived at Z.," for purposes of demurrage, on September 5 (*g*).

Note 2.—*A dock as ordered on arriving, if sufficient Water.*

Case.—A ship was chartered to proceed to Z. to discharge in "a dock as ordered on arriving, if sufficient water, or so near thereto as she may safely get, always afloat." On arriving at Z. she was ordered to the C. dock, but there was not for four weeks sufficient water in the C. dock. *Held*, that there must "be sufficient water" in the dock, when the order is given, and that if there is not, the ship is not bound to discharge in the dock named (*h*).

Note 3.—If the above statement of the law is correct, the Scotch case of *Hillstrom* v. *Gibson* (*i*), and the *dicta* following it in the English cases of *Capper* v. *Wallace* (*k*) and *Nielsen* v. *Wait* (*l*) are not law.

In *Hillstrom* v. *Gibson*, a ship was chartered abroad to take "a full cargo to a safe port in the United Kingdom, or so near thereunto as she may safely get, and lay afloat at all times of the tide and deliver the same" . . . [here the printed words "according to the custom of the port" were struck out]. . . . "and so end the voyage." The ship was ordered to Glasgow, and arrived at "the Tail of the bank," an open roadstead off Greenock, 22 miles from Glasgow. The ship then drew 18 feet of water; low water at Glasgow giving 16½ feet. The master claimed to deliver at "the Tail," but the charterers required him to lighten one-fifth of the cargo into lighters at their expense, and then proceed to Glasgow, this being the custom of the port of Glasgow. The master lightened and proceeded to G., but alleged that his lay-days began from his arrival at "the Tail," and claimed demurrage accordingly. The charterers alleged that the lay-days began on the ship's arrival at G.

The Court of Session, Lord Deas dissenting, held that the master was bound to construe the document reasonably, and therefore, if a lightening of only one-fifth of the cargo would enable him to proceed to the named port, it was reasonable that he should do so, and he was bound to do so. It is difficult to

(*g*) *Horsley* v. *Price* (1882), 11 Q. B. D., 244. Without the clause "at all times of the tide," the ship must have waited at her own expense till the 9th. *Parker* v. *Winlow* (1857), 7 E. & B. 942.
(*h*) *Allen* v. *Coltart* (1883), 11 Q. B. D. 782.
(*i*) (1870), 8 Sc. Sess. C. 3rd ser. 463.
(*k*) (1880), L. R. 5 Q. B. D. 163.
(*l*) (1885), L. R. 14 Q. B. D. 516. (Pollock, B.)

see why, if this decision is correct, the ship should not be required to bear the expense of unloading necessary to enable her to fulfil her voyage.

But in the case of *The Alhambra* (*m*), almost similar facts arose from a different point of view. In *Hillstrom* v. *Gibson* the master had proceeded to the port named, one which he could not enter with a full cargo, but had stopped when he could proceed no further without lightening, alleging that that was "as near as he could safely get," though a custom was asserted to lighten in order to "safely get further." In *The Alhambra*, with a similar port, and a similar custom alleged, the master refused to go there at all, asserting that it was not a safe port. The charterers sued him for breach of contract, and Sir R. Phillimore decided in their favour, but the Court of Appeal reversed his decision. Brett, L.J., said: "The case of *Shield* v. *Wilkins* (*n*) seems to me to be authority precisely in point as to the principles of this decision. I will say nothing about *Hillstrom* v. *Gibson*. I will reserve my view of how far one is bound to follow that case, until the point which was decided in it arises. It does not seem to be applicable to the present case." But he also said: "The condition on which the ship was entitled to go into this port was as fully loaded, and she was not bound to unload before she got into that port." If this is good law, *Hillstrom* v. *Gibson* is clearly bad; the only point of difference between the two cases is that in the Scotch case about a fifth of the cargo had to be unloaded, in the English case more than a third. But none of the Court of Appeal lay stress, as some other cases do (*o*), on the amount of lightening. All of them carefully define a "safe port" as a port into which the vessel can get fully loaded and not lightened, and reject the alleged custom to lighten outside the port.

If so, Glasgow, under the facts of *Hillstrom* v. *Gibson*, was not "a safe port"; the ship was either not bound to go there at all, or only as near as she could get safely as a loaded ship; i.e., to "the Tail," and there discharge. Her lay-days would begin from her arrival at her legal discharging berth, and the master's claim for demurrage was justified.

From this point of view Brett, L.J.'s, remark that *Hillstrom* v. *Gibson* had nothing to do with it, must be ascribed to a wish to put on one side the Scotch decision without disrespect to the important Scotch Court. The Court of Appeal expressly approve *Shield* v. *Wilkins* (*p*), which is the converse case of loading at a port where a full cargo cannot be loaded. In such a case a ship can either: (1), load her full cargo outside the bar, if such a loading berth is safe; (2) refuse to load at all, if a loading berth outside the bar is unsafe; (3) go in, and load such a cargo

(*m*) (1881), L. R. 6 P. D. 68.
(*n*) (1850), 5 Ex. 304.
(*o*) *Vide post*, note (*t*).
(*p*) (1850), 5 Ex. 304.

as she can cross the bar with, and no more, without being compelled to complete her loading outside the bar.

If *Hillstrom* v. *Gibson* is bad law in England, some of the *dicta* in *Capper* v. *Wallace* (*q*), which are avowedly based on it, must go to. There a ship was chartered to take a full cargo to "a safe port, or so near thereto as she could safely get." The port named was Z., which was approached by a canal, and the vessel as loaded drew too much water to enter the canal. She proceeded to its mouth, and proposed to discharge there; the charterers required her to deliver at Z. as the master had signed bills of lading for that port. The ship took out nearly half her cargo, and then proceeded to Z.; the charterers paid the lighterage of the discharged cargo, but declined to pay the extra expense of proceeding beyond the mouth of the canal, which the owner claimed. The Court (Lush and Manisty, J.J.), held that they were liable on the ground that the quantity by which the ship was to be lightened was more than could reasonably be asked of the shipowner, and that as the charterers had made no arrangements for receiving cargo at the mouth of the canal, the master was justified in considering the voyage at an end at the mouth of the canal. The judges went on to say (*r*), basing their remarks on *Hillstrom* v. *Gibson*, "It cannot be laid down as an inflexible rule that when a ship has got as near the port as she can get, and the only impediment to proceeding further is overdraught, the master is, under all circumstances, to consider the voyage at an end. He is bound to use all reasonable means to reach the port. . . . The overdraught may be such, and the cargo so easily dealt with, that the surplus may be removed . . . without exposing the ship to any risk or the owner to any prejudice, and in such a case, if the consignee is at hand to receive the surplus cargo, *we are of opinion that it would be the duty of the master to lighten the ship and proceed to the port.* This is the principle laid down by the Court of Session in *Hillstrom* v. *Gibson*."

It is sufficient to compare this with the judgment of the Court of Appeal in *The Alhambra*, in the following year: "The condition in which the ship was entitled to go into the port was as fully loaded, *and she was not bound to unload before she got into that port*," to show that the *dictum* in *Capper* v. *Wallace* cannot be treated as law. *Hayton* v. *Irwin* (*s*) only decides that if the ship is willing to lighten and proceed, the charterer must take the cargo and pay the expense of lightening: it does not decide that the ship is bound to proceed.

The distinction between lightening for better navigation and lightening for discharge of cargo in pursuance of the contract, the jury having to decide the point, has been suggested in other

(*q*) (1880), L. R. 5 Q. B. D. 163. (*r*) *Ib.* at p. 166.
(*s*) (1879), L. R. 5 C. P. D. 130 (C.A.)

cases (*t*). In all these, the ship had entered the port before being required to lighten, and the question was one of calculation of demurrage. But in *Nielsen* v. *Wait*, Pollock, B., went further, and said: "Assuming *Hillstrom* v. *Gibson* to be correct, and to be properly applicable to a case like the present, it does not, in my judgment, affect the question whether the position of the place where the lightening takes place is without or within the ambit of the particular port. The point to bear in mind is, what was the substantial character of the act? Was it a part discharge in the ordinary acceptation of those words, or was it a discharge made solely with the view of lightening the ship?" *The Alhambra* had not been cited, yet that case had clearly decided that the shipowner was not bound to lighten outside the port.

Even if, therefore, the distinction between lightening and discharging exists within the port, it is clear that *Hillstrom* v. *Gibson* (1870), followed by *dicta* in *Capper* v. *Wallace* (1880), and *Nielsen* v. *Wait* (1885), is the only authority for the master's duty to lighten outside the port. The Court of Appeal affirmed *Nielsen* v. *Wait*, but on an entirely different ground, the existence of a local custom within the port (*u*). And it is submitted that *Hillstrom* v. *Gibson*, and the *dicta* referred to cannot, in the face of *The Alhambra* (1881), be considered good law.

Article 38.—*Loading under a Charter. Duty of Shipowner.*

At the port of loading the shipowner's right under a charter to require a cargo, and the charterer's duty to furnish a cargo will begin when:—

(1) The ship is at the place where the carrying voyage is to begin. (Article 39.)
(2) When the ship is ready to load. (Article 40.)
(3) When the charterer has notice of the above facts. (Article 41.)

When these conditions are fulfilled the lay-days, or days allowed the ship for loading, begin (*v*).

(*t*) *Caffarini* v *Walker* (1876), Irish Rep. 10 C. L. 250; *McIntosh* v. *Sinclair* (1877), Irish Rep. 11 C. L. 456, at p. 463; *Nielsen* v. *Wait* (1885), 14 Q. B. D. 516 at p. 523. In *Brereton* v. *Chapman* (1831), 7 Bing. 559, cited with approval by Pollock, B., in *Nielsen* v. *Wait*, it is not stated whether the place of lightening was within or without the port, and the judges say nothing about the master's duty to lighten.

(*u*) (1885), 16 Q. B. D. 67.

(*v*) See the general statement of the law by Brett, L.J., in *Nelson* v. *Dahl* (1879), 12 Ch. D. 580–585.

Article 39.—*The place where the carrying voyage is to begin.*

The place where the carrying voyage is to begin will depend on the terms of the charter.

1. If it is "to proceed to the port of X. and there load" the ship must proceed to the usual place of loading in that port (*x*).

Where there are several usual places of loading, the charterer, not the owner, is entitled to decide which the ship shall load at, and if the owner has already proceeded by his own choice to one, he must bear the expense of proceeding to another, if ordered by the charterer (*y*).

Where the ship is to load at "one of the usual places of loading," it will be a question for the jury what transactions amount to a "loading at a usual place," and the charterer will be liable for the extra expense of loading at other places after the first "usual place" (*z*).

If within the port there is a custom to require the loading or unloading to take place at various parts of the port, the shipowner must, in the absence of special clauses, comply with the custom. The commencement and mode of calculation of the lay-days will depend on the custom of each particular port (*a*), but in the absence of any custom will commence on the ship's arrival at the first place in the port where such vessels usually load or unload, and will include the time spent in moving the ship to other usual places of loading or discharge (*b*).

2. If the charter runs "to proceed to a (named) dock, and there load," in the absence of any special custom to the contrary (*c*), the ship will have fulfilled her obligations when she gets into the dock, though she may not reach that part

(*x*) *Nelson* v. *Dahl*, 12 Ch. D. 582, per Brett, L.J.; *Brereton* v. *Chapman* (1831), 7 Bing. 559; *Kell* v. *Anderson* (1842), 10 M. & W. 498; *Cargo ex Argos* (1873), L. R. 5 P. C. at p. 160.

(*y*) *The Felix* (1868), 2 L. R. Adm. 273.

(*z*) *Brown* v. *Johnson* (1842), Car. & M. 440.

(*a*) *Nielsen* v. *Wait* (1885), 16 Q. B. D. 67.

(*b*) *Caffarini* v. *Walker* (1876), Ir. Rep. 10 C. L. 250; *MeIntosh* v. *Sinclair* (1877), Ir. Rep. 11 C. L. 456; *Nielsen* v. *Wait*, *vide supra*, et *per* Pollock, B., 14 Q. B. D. 523. See Articles 129, 130, on Demurrage, *post*.

(*c*) *SS. Norden* v. *Dempsey* (1876), 1 C. P. D. 654.

of the dock where she is to load (or discharge) for some time afterwards (*d*).

She must wait a time commercially reasonable to get into the dock (*e*).

3. If the charter is "to proceed to a particular place in the dock, or a named quay or wharf," the ship must proceed to that particular place (*f*), and must wait a time commercially reasonable in order to do so (*g*).

4. If the charterer will not name a wharf or dock, where none is named in the charter, and there is more than one in the port, he will be liable for any damages occasioned by the delay (*h*), but he is not bound to name one that can be reached immediately (*i*).

Note.—"*To proceed to a ready quay berth, as ordered by charterer.*"—Under this clause, the charterers were held bound to name, on the ship's arrival, a berth then ready for her to load in, and were liable for any damages caused by their delay (*j*).

Case 1 (*k*).—A ship was chartered to take coals to London, the vessel to be delivered in five working days: she entered the port of L. at Gravesend, on March 9, but was not allowed to proceed to the Pool, the usual place for the discharge of colliers, till March 20. *Held*, that the lay-days were to be reckoned from the time of the ship's arrival at the ordinary place of discharge, according to the usage of the port of L. for such vessels (*l*).

(*d*) *Tapscott* v. *Balfour* (1872), L. R. 8 C. P. 46; *Davies* v. *McVeagh* (1879), (C.A.) L. R. 4 Ex. D. 265; *Randall* v. *Lynch* (1810), 2 Camp. 352; *Brown* v. *Johnson* (1842), 10 M. & W. 331.

(*e*) *Dahl* v. *Nelson* (1881), L. R. 6 App. Cas. 38.

(*f*) *Murphy* v. *Coffin* (1883), 12 Q. B. D. 87; *Strahan* v. *Gabriel* (1879), cited by Brett, L.J., at 12 Ch. D. 590.

(*g*) *Parker* v. *Winlow* (1857), 7 E. & B. 942; *Bastifell* v. *Lloyd* (1862), 1 H. & C. 388. Article 36.

(*h*) *Stewart* v. *Rogerson* (1871), L. R. 6 C. P. 424: where, the charter being to load at a good and safe wharf, the charterer refused to name one, and the shipowner recovered as damages the freight he had lost, through his ship's being attached by the Court of Admiralty owing to the delay.

(*i*) *Murphy* v. *Coffin* (1883), 12 Q. B. D. 87.

(*j*) *Harris & Dixon* v. *Marcus Jacobs & Co.* (1885), 15 Q. B. D. 247.

(*k*) As the law as to loading and unloading on this point is identical, with the exception that no notice of readiness to unload is required, I have cited cases as to unloading in support of these propositions.

(*l*) *Kell* v. *Anderson* (1842), 10 M. & W. 498. The case of *Ford* v. *Cotesworth* (1870), L. R. 5 Q. B. 544, is not inconsistent with this. There the charter was to proceed to Lima and deliver in the usual and customary manner. The ship proceeded to Callao, the usual port of discharge for L., but was prevented from discharging for seven days by acts of the Government; and it was held that if there had been a time fixed for the discharge it would have begun on arrival at the usual place of discharge, but that as there was no fixed time, reasonable diligence only was required, and the delay from the time of arrival was not unreasonable

Case 2.—A ship was chartered "to proceed to a port in the Bristol Channel, or so near thereto as she may safely get at all times of the tide and always afloat, eight running days, Sundays excepted, to be allowed the merchants, and for loading and discharging the cargo." The steamer was ordered to Gloucester, and arrived at Sharpness, within the port of Gloucester, but seventeen miles from the usual basin for discharging grain cargoes; at S. she unloaded sufficient grain to enable her to proceed to the basin. The shipowner claimed to date his "running days" from commencing to discharge at S. A custom of the port of Gloucester was proved, that vessels too heavily laden to proceed beyond S. were lightened at S., and that the times of unloading at S. and G. counted in the lay days, but not at the time of proceeding from S. to G. *Held*, a reasonable custom, and not inconsistent with the charter, though, in its absence, the lay-days would have run consecutively, Sundays excepted, from commencing to discharge at S. (*m*).

Case 3.—A ship was chartered "to proceed to the port of Newry, or so near thereto as she can always float with safety—cargo to be delivered alongside of the vessel where she can discharge always afloat within reach of her tackle," . . . lay-days to begin "from the time when the vessel is ready to discharge cargo."

The custom of Newry is: to lighten or discharge the vessel to a draught of fourteen feet at the Pool, if necessary, the merchant bearing the expense of lighterage, and accepting that part of the cargo as discharged there; to proceed then four miles to the sea locks at the end of the canal, and there lighten, if possible and necessary, to a draught of twelve feet six inches. If the ship cannot be lightened to that draught, she finishes her discharge at the sea-locks. If she can, she proceeds up the canal to the Albert Basin at Newry and there completes her discharge. The jury found that the Pool was within both the fiscal and the commercial port of Newry. *Held*, that the lay-days began when the ship was ready to discharge at the Pool, and included the times of transit to the other discharging places (*n*).

Case 4.—A ship was chartered to proceed to any dock at Z., as ordered by charterers, and then load coal in the usual and customary manner. She was ordered to the W. dock. Coal is usually loaded in the W. docks from tips, sometimes from lighters. By the dock regulations of Z. no coal agent is allowed to have more than three vessels in the dock at the same time. The vessel was ready to go into dock on July 3, but the charterer's agent having already three vessels in the dock she was not admitted till July 11, and could not get under the tips till July 22. *Held*, that the lay-days commenced on July 11, and that the words "load in the usual and customary manner," referred to the manner and not the place of loading (*o*).

Case 5.—A ship was chartered to load at B. Dock, Z., "to be loaded and

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under the circumstances. In *Thiis* v. *Byers* (1876), 1 Q. B. D. 244, where there was a fixed time named, the lay-days counted from the arrival at the usual place of discharge. See also *Brereton* v. *Chapman* (1831), 7 Bing. 559.

(*m*) *Nielsen* v. *Wait* (1885), 16 Q. B. D. 67 (C.A.), whose decision proceeded on different grounds from that of Pollock, B., in the Court below, 14 Q. B. D. 516.

(*n*) *McIntosh* v. *Sinclair* (1877), 11 Ir. Rep. C. L. 460. See also *Caffarini* v. *Walker* (1876), 10 Ir. Rep. C. L. 250.

(*o*) *Tapscott* v. *Balfour* (1872), L. R. 8 C. P. 46; see note (*p*). See also *Shadforth* v. *Cory* (1863), 32 L. J. Q. B. 379. In *SS. Norden* v. *Dempsey* (1876), 1 C. P. D. 654, a custom for timber ships at Liverpool that the lay-days should begin on reaching a particular place in the dock, was proved and held binding.

discharged in nineteen running days." On November 20, the ship being ready to load, was admitted into B. dock by the dock authorities, as a matter of favour; owing to dock regulations, she did not begin to load till December 5. *Held*, that the running days began when she entered the dock, and not when she reached her loading berth (*p*).

(*p*) *Davies* v. *McVeagh* (1879), L. R. 4 Ex. D. 265 (C.A.); as explained by Brett, M.R., the judge at the trial, in *Nelson* v. *Dahl*, 12 Ch. D. 590. Some remarks of Bramwell, L.J., in this case, not expressly acquiesced in by the other Lords Justices, seem open to serious doubt. He said, "I think it may be laid down that a vessel has reached the place of loading, as distinguished from the spot of loading, when she has entered that port from which her voyage is to commence . . . . suppose that the defendant's vessel had been lying in the river M., and that her captain had given notice to the charterer that he was ready to enter the dock, and ready to take on board the cargo; I do not think it would be open to the charterer to contend that the vessel was not at the place of loading, and that the lay-days did not begin to run." He admits that this conflicts with *Tapscott* v. *Balfour*, *v.s.*, but justifies it by *Ashcroft* v. *Crow Colliery Co.* (1874), L. R. 9 Q. B. 540.

In that case, a ship was chartered to load coal at Z. "with the usual despatch of the port." The vessel was to load at the B. docks, and the same regulations existed as in *Tapscott* v. *Balfour*, but here the charterer was his own agent. As the result of these regulations, the ship was kept waiting outside the dock for thirty days, before she could get in. The Court held there was an absolute contract by the charterer to load "with the usual despatch of the port," and that this had been broken. They distinguish *Tapscott* v. *Balfour*, by construing the contract here as one not to detain the ship beyond the usual and ordinary period of delay "at the dock." But the charterer's contention would be that the ship never had reached the dock, and that his liability only began when she entered the dock named in the charter for loading.

This case was commented on by Brett, L.J., at 12 Ch. D. 589; who took the view, either that the vessel being in the port of Z. at the time of the making of the charter, the clause as to the dock must be treated as a note as to the particular part of the port, and that the time for loading began when the ship was at her port of loading, as distinguished from any part of it, or else that it was a decision as to the extent of the charterer's liabilities, and not as to the time when they began. Lord Blackburn, in *Postlethwaite* v. *Freeland* (1880), 5 App. C. at p. 622, also treats the case as a decision on the meaning of the clause to load "with the utmost despatch," and says: "I think it is probably right." It can hardly be taken as a good decision that a ship chartered to load in a dock is ready to load, so that her lay-days begin, when she reaches the entrance to the dock. To so decide would be directly contrary to *Tapscott* v. *Balfour*, and also to the principle stated in the House of Lords in *Dahl* v. *Nelson* (1881), L. R. 6 App. C. 38, 42, by Lord Blackburn, who said: "It was contended that the merchant undertakes to procure the ship admission to the docks . . . . it is clear that this is untenable. The legal effect of the contract, as far as regards the shipowner is, that he binds himself that his ship shall (unless prevented by some of the excepted perils) proceed to the discharging place agreed on in the charter. That is in this case the S. C. Docks, which must, I think, mean *inside the docks*." The effect of *Ashcroft* v. *Crow Coll. Co.* as an authority "on the usual despatch of the port," is dealt with below (Art. 132, 133), but it is difficult to understand here how the argument that the charterer incurred no liability till the vessel had entered the docks named for loading, is to be met, unless by the consideration, not alluded to in the judgments, that the ship was prevented entering by the previous engagements of the charterer or his agents. See *Wright* v. *New Zealand Co.* (1879), L. R. 4 Ex. D. (165); *Tillett* v. *Cwm Avon* (1886), 2 Times L. R. 675. And see *post*, note to Article 132, 133.

In *Davies* v. *McVeagh* (1879), L. R. 4 Ex. D. 265, Bramwell, L.J., distinguishes *Kell* v. *Anderson* (1842), 10 M. & W. 498, Case 1, *supra*, as a case where the vessel had not completed her voyage by reaching Gravesend; but if chartered to

Case 6.—A ship was chartered to discharge cargo at a (named) quay at Z. The ship arrived and found the only quay berth occupied by another ship. The shipowner offered to discharge across the other ship, if the charterer would pay the additional expense. The charterer refused. *Held*, that the lay-days did not begin till the ship was alongside the quay, the place named where the voyage was to end (*q*).

Case 7.—A ship was chartered to load coals and proceed to Z., and deliver the same at one of four named places, "as ordered by charterer . . . forty-eight running hours for loading and discharge." She was ordered to discharge at W. wharf, and entered the dock for that purpose; the discharging berths at the W. wharf being full, she did not begin to unload till twenty-four hours after entering the dock. *Held*, that the lay-days did not begin till the ship reached the W. wharf (*r*).

Article 40.—*Readiness to load.*

A ship to be ready to load must be completely ready in all her holds, so as to afford the charterer complete control of every portion of the ship available for cargo (*s*). She must also in the absence of special stipulation have obtained all papers and permits necessary for loading.

Case.—A ship was chartered with a power to the charterer to cancel the charter if the ship were not ready to load on or before May 31. On that day she had only discharged two of her holds, and was not completely discharged till the middle of the next day. *Held*, the charterers were entitled to cancel.

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load at a dock, the shipowner is bound to proceed within the dock, and has not fulfilled his obligation till he has done so. It is submitted, therefore, that the *dicta* of Bramwell, L.J., cannot be sustained in face of *Tapscott* v. *Balfour* and *Dahl* v. *Nelson*.

(*q*) *Strahan* v. *Gabriel* (1879), *per* Brett, L.J., 12 Ch. D. 590.

(*r*) *Murphy* v. *Coffin* (1883), 12 Q. B. D. 87. In this case again a *dictum* of Bramwell, L.J., in *Davies* v. *McVeagh* (*vide supra*) was criticised. He had there said, "When a ship is to take on board cargo at a specified place of loading, the responsibility rests not with her owner, but with the charterer, if the specified berth is not in a fit state to receive her upon her arrival at the appointed time." But this is contrary to *Strahan* v. *Gabriel* and *Dahl* v. *Nelson*, and also to all the cases on the clause, "or so near as she can safely get," which hold that the shipowner must wait a reasonable time for the removal of obstacles which prevent his getting to the appointed place. *Sed quære*, if these obstacles are caused by the charterer, as by the number of ships he or his agent has already in the dock or at the wharf; see note (*p*), *ante*, and Arts. 132, 133, *post*. Matthew and Day, J.J., in *Murphy* v. *Coffin*, not only disregarded the *dictum*, but expressed their opinion that the whole case was inconsistent with previous decisions; [on this *vide supra*, note (*p*)].

(*s*) *Groves, Maclean & Co.* v. *Volkart* (1884), 1 C. & E. 309; *per* Brett, L.J., at 12 Ch. D. 583; *Oliver* v. *Fielden* (1849), 4 Ex. 135; *Balley* v. *D'Arroyave* (1838), 7 A. & E. 919. In practice the ship is considered "ready to load" though stiffening ballast, or cargo used for stiffening the ship, has yet to be put on board her.

Article 41.—*Notice to Charterers of readiness to load.*

The shipowner must give notice to the charterers of the ship's readiness to load her cargo at the place agreed on in the charter (*t*).

Case 1.—A ship was chartered to proceed direct to the S. dock, and there load in the usual and customary manner. In an action by shipowner against charterer for not loading, the latter pleaded that by reason of want of notice of the ship's arrival at the S. dock and her readiness to load, the charterers were unable to load her. *Held*, a good defence, if proved (*u*).

Case 2.—A ship was chartered to proceed to A., and there load; she arrived at A. with a cargo on owner's account. Her arrival was entered at the Custom House, but no notice was given to the charterer of her readiness to load homeward cargo. *Held*, the charterer was not liable for failing to provide a cargo (*x*).

Article 42.—*Duty of Charterers to furnish Cargo.*

In the absence of express stipulations qualifying it (*y*), the duty of the charterer to furnish a cargo according to the charter is absolute. The charterer therefore will not be relieved from his express contract to load in a fixed time, or from his implied contract to load in a reasonable time, by anything preventing him from bringing a full and complete cargo to the place of loading (*z*).

"The usual despatch in loading" means the usual despatch of a person who has at the place of loading a cargo ready for loading (*a*). The exceptions in a charter do not usually

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(*t*) *Stanton* v. *Austin* (1872), 7 L. R. C. P. 651; *Fairbridge* v. *Pace* (1844), 1 C. & K. 317.

(*u*) *Stanton* v. *Austin*, *vide supra*.

(*x*) *Fairbridge* v. *Pace*, *vide supra*. What amount of notice will suffice is doubtful. If the charterers are proved to be otherwise aware of the readiness to load, I do not think express notice would be required. No notice is required of readiness to discharge. [*Vide post*, art. 124.]

(*y*) See note p. 85.

(*z*) Lord Selborne in *Coverdale* v. *Grant* (1884), L. R. 9 App. C. at pp. 475–6. Lord Blackburn in *Postlethwaite* v. *Freeland* (1880), L. R. 5 App. C. at p. 619. As this duty devolves on the charterer alone, he does not come within the principle of *Ford* v. *Cotesworth*, L. R. 4 Q. B. at pp. 133, 134; 5 Q. B. 544 (1870). Thus, in *Kirk* v. *Gibbs* (1857), 1 H. & N. 810, where a charterer had contracted to load a full cargo, and to procure the necessary Government pass for loading: *Held*, no defence that the Government would only grant a pass on condition a full cargo was not loaded. So if the duty is on the shipowner alone, as in *Hills* v. *Sughrue* (1846), 15 M. & W. 253.

(*a*) *Kearon* v. *Pearson* (1861), 7 H. & N. 386.

apply to protect the charterer who has failed to load, till the joint operation of loading is ready to begin, ship and cargo being ready at the place of loading (*b*). Thus, in the absence of express exceptions, the charterer will not be excused from loading by:—(I.) causes preventing a cargo being obtained, as strikes (*c*), bankruptcy of merchants supplying the cargo (*c*), or non-existence of such cargo (*d*), or:—(II.) causes preventing a cargo when obtained from being transmitted to the port of loading, as ice (*e*), bad weather (*f*), railway delays (*g*), or Government orders (*h*).

The charterer may be released from such a contract by:

I. express exceptions, the perils excepted being proved not merely to exist, but also to directly prevent the loading of the ship (*i*).

II. By evidence that the parties, when they contracted, were aware of a particular state of things which might cause delay, provided that the actual delay is not unreasonable (*k*).

III. By evidence that there was only one method of loading ever used at the port, which involved in all cases the transit of cargo from a particular place in a particular way, in which case accidents preventing such transit may come within exceptions "preventing loading" (*l*).

When once the loading is completed, the charterer's

(*b*) *Coverdale* v. *Grant*, *vide supra*; *Kay* v. *Field* (1883), 10 Q. B. D. 241.

(*c*) *Per* Lord Selborne, 9 App. C. 476.

(*d*) *Hills* v. *Sughrue* (1846), 15 M. & W. 253.

(*e*) *Coverdale* v. *Grant*, *vide supra*; *Kay* v. *Field*, *vide supra*; *Kearon* v. *Pearson*, *vide supra*.

(*f*) *Fenwick* v. *Schmalz* (1868), L. R. 3 C. P. 313.

(*g*) *Adams* v. *Royal Mail Steam Co.* (1858), 5 C. B., N. S. 492; *Elliott* v. *Lord* (1883), 52 L. J. P. C. 23.

(*h*) *Semble* from *Ford* v. *Cotesworth* (1869), L. R. 4 Q. B. 127: and see Case 6, *sub.*

(*i*) *Per* Lord Blackburn, (1880) *Postlethwaite* v. *Freeland*, 5 App. C. at p. 619; *The Village Belle* (1874), 30 L. T. 232. Thus the perils must prevent the loading of cargo by any ship; *e.g.* the order of an invading army that *no* grain shall be exported: *Bruce* v. *Nicolopolo* (1855), 11 Ex. 129. *Blight* v. *Page* (1801), 3 B. & P. 295, note, seems to turn on the absence of an exception of "restraint of princes" in favour of the shipper. Where a charter excepted "accidents," it was held that a snowstorm preventing transit of cargo was not "an accident beyond the control of the charterer, preventing or delaying the loading," it being an ordinary operation of nature: *Fenwick* v. *Schmalz*, *vide supra*.

(*k*) *Harris* v. *Dressman* (1854), 23 L. J. Ex. 210; and see Case 7, *sub.*

(*l*) *Hudson* v. *Ede* (1868), L. R. 3 Q. B. 412, as explained by Lord Selborne, 9 App. C. 477.

obligation is fulfilled (*m*), and subsequent delays, as by ice (*n*), or failure to procure clearances (*o*), must fall on the shipowner.

The cargo tendered must be one reasonably complying with the terms of the charter (*p*).

Note.—Many charters contain a clause specially dealing with the charterer's duty to furnish a cargo, *e.g.*, "Cargo to be loaded in running hours, Sundays and holidays excepted, from the time true written notice is given (between 9 A.M. and 5 P.M.), that all ballast or inward cargo is discharged and the vessel is ready to receive her cargo; any time lost through riots, strike, lockout, or by reason of accidents to mines or machinery, obstruction in the railway and the docks, or by reason of floods, frosts, storms, or any cause beyond the control of the said charterers not to be computed as part of the loading time."

Case 1.—A ship was chartered to "proceed to Cardiff East Bute Dock and there load iron in the customary manner . . . cargo to be supplied as fast as steamer can receive . . . time to commence from the vessel's being ready to load . . . except in case of hands striking work, or frosts, or floods, or any other unavoidable accidents preventing the loading."

The charterer's agent had his own iron at a wharf in a canal outside the dock; but there were other agents with wharves in the dock, and it was possible, though expensive, to bring the iron from the wharf to the dock by land. Frost stopped the transit of the iron by the canal, though it would not have stopped the loading if the cargo had been in the dock. *Held*, that the charterers were liable for the delay as the frost did not prevent the loading, but only the transit of the cargo to the place of loading by one of the ways usual at the port (*q*).

Case 2.—A ship was chartered to load coal "in regular and customary turn, except in case of riots, strikes, or other accidents beyond charterer's control delaying or preventing loading." A snowstorm delayed the transit of the coal to the place of loading. *Held*, the charterers were liable for the delay (*r*).

(*m*) *Smith* v. *Wilson* (1817), 6 M. & S. 78.

(*n*) *Pringle* v. *Mollett* (1840), 6 M. & W. 80.

(*o*) *Barret* v. *Dutton* (1815), 4 Camp. 333.

(*p*) *Holman* v. *Dasnieres* (1886), 2 Times L. R. 480, 607. Thus a charter to load a cargo of pitch in bulk, will not be satisfied by a cargo which has melted, and has to be dug out of the trucks; a "cargo of machinery" without any particular description of it, by a single piece of machinery, to ship which the master must cut open his decks.

(*q*) *Coverdale* v. *Grant* (1884), 9 App. C. 470. See also *Kay* v. *Field* (1883), 10 Q. B. D. 241. In *Kearon* v. *Pearson* (1861), 7 H. & N. 386, it was said "the time for loading has no reference to the place whence the cargo is to come," *i.e.*, "usual despatch" could not be construed "usual despatch of cargo coming from a particular colliery," but "usual despatch of persons having a cargo ready for loading."

(*r*) *Fenwick* v. *Schmalz* (1868), L. R. 3 C. P. 313.

Case 3.—A shipowner agreed to send his ship to X., and there find and take on board a full cargo of guano. There was no guano at X. within a reasonable time of the ship's arriving. *Held*, the shipowner was absolutely bound to find and load a full cargo (*s*).

Case 4.—A ship was chartered to load at X. a full cargo of coals, taking her turn with other steamers, and receive prompt despatch in loading and discharging. The ship was loaded in her turn, but was delayed owing to a short supply of coals from the mines. *Held*, the charterer was liable for the delay (*t*).

Case 5.—A ship was chartered to proceed to X., and there load coals in the customary manner. The loading was delayed by a dispute between the railway and the collieries as to rates of carriage, and by a strike of colliers. *Held*, that the charterers were liable for the delay (*u*).

Case 6.—A ship is chartered to load cattle at an English port; though the loading of cattle already at that port would not be prohibited, their transport to that port is forbidden by Order in Council. *Submitted*, the charterer would be liable to delay arising from such order (*x*).

Case 7.—A ship was chartered to load at S. colliery. Before signing the charter both parties knew that the colliery engine had broken down and was being repaired. *Held*, that if the engine was repaired, and the ship loaded, in a reasonable time, the charterer was not liable, as the owners signed the charter, knowing of the breakdown of the engine (*z*).

Case 8.—A ship was chartered to proceed to X. "and there load grain; the cargo to be brought to and taken from alongside the ship at the ports of loading and discharge at the charterer's expense and risk . . . thirty running days for loading . . . detention by ice not to be reckoned as lay-days." All grain loaded at X. was brought by river from U. ninety miles off. Owing to ice between U. and X. the cargo was detained in transit to X. *Held*, that the conveyance from U. by water, being the only method used, must be considered as part of the act of loading, and that the exception as to ice relieved the charterer from liability (*a*).

Case 9.—A ship was chartered for an outward and homeward voyage; she was loaded and despatched on her outward voyage, but captured and brought back for adjudication; her cargo was taken out and sold. The owner on receiving her back offered her again to the charterers to carry the outward cargo. *Held*, that he was not entitled to do so (*b*).

Case 10.—A ship chartered with thirty running days for loading finished

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(*s*) *Hills* v. *Sughrue* (1846), 15 M. & W. 253. This case is quite inconsistent with *Clifford* v. *Watts* (1870), L. R. 5 C. P. 577. Brett and Willes, JJ., in that case treat it as a contract by the charterer to find a full cargo, which it certainly was not.

(*t*) *Elliott v. Lord* (1883), 52 L. J. P. C. 23.

(*u*) *Adams* v. *Royal Mail Steam Co.* (1858), 5 C. B., N. S. 492.

(*x*) On authority of *Ford* v. *Cotesworth* (1870), L. R. 5 Q. B. 549: if export from the English port were actually forbidden, the charterer would be excused; so if it were a foreign port and no time was named for loading: *Vide supra*, Article 39, note (*l*).

(*z*) *Harris* v. *Dreesman* (1854), 23 L. J. Ex. 210.

(*a*) *Hudson* v. *Ede* (1868), L. R. 3 Q. B. 412, as explained by Lord Selborne in *Coverdale* v. *Grant* (1884), 9 App. C. 477. The *dictum* of Willes, J., approved by the Court in *Hudson* v. *Ede*, that "whenever there was no access to the ship by reason of excepted perils from any one of the storing places from which goods were conveyed direct to the ship, the exception in the charter would apply," must be taken as overruled by *Coverdale* v. *Grant*.

(*b*) *Smith* v. *Wilson* (1817), 6 M. & S. 78.

her loading on February 25, but owing to a fire at the custom-house her clearances could not be obtained till March 9, when she sailed. *Held*, that as it was the duty of the owner to obtain clearances, the charterer was not liable for the delay (*c*).

Article 43.—"*Alongside.*"

In ordinary circumstances goods to be brought "alongside" must be delivered immediately alongside, *i. e.*, to the ship's tackle. When it is clear from the charter that it is contemplated that the ship should do something outside herself, as in the clause "cargo to be brought alongside, whence it shall be put on board by the master," "alongside" may have a wider meaning (*d*).

The shipowner's duty does not begin till the goods are under his charge (*e*).

If the shipowner takes the goods for loading before they have been brought to the place to which it is the duty of the charterer under the charter to bring them, he cannot, without express agreement to that effect, claim from the charterer any extra expense incurred in so doing (*f*).

Article 44.—*Charterer's refusal to load.*

If the charterer expressly refuses to load the vessel, the shipowner need not wait till the end of the days allowed for loading before he can sue for a breach of the contract to load, but may treat such a refusal as final (*g*). If he does not

(*c*) *Barrett* v. *Dutton* (1815), 4 Camp. 333. On a charter that the ship "should be consigned to charterer's agent free of commission," and cargo to be taken from vessel free of any expense to the ship. *Held*, that the charterers must clear ship and cargo, free of expense to the owner: *Russell* v. *Griffith* (1860), 2 F. & F. 118. When a ship was chartered to proceed with cargo to F. "where the ship shall be consigned to charterer's agents inwards and outwards, paying the usual commission." *Held*, not to bind the shipowner to take a homeward cargo from F. from charterer's agents, but only, if he took any cargo at F., to employ charterer's agents for the ship-broking work: *Cross* v. *Pagliano* (1870), L. R. 6 Ex. 9. The broker's work and the Customs work are usually provided for by separate clauses in the charter. "The ship to be consigned to ," for the broker's work, and "the ship to be reported by ," for the Customs work.

(*d*) *Holman* v. *Dasnieres* (1886), 2 Times L. R. 480, 607.

(*e*) Per Lord Selborne in *Coverdale* v. *Grant* (1884), L. R. 9 App. Cas. at p. 475. See also *British Columbia Co.* v. *Nettleship* (1868), L. R. 3 C. P. 499.

(*f*) *Holman* v. *Dasnieres* (1886), 2 Times L. R. 480, 607. In *Fletcher* v. *Gillespie* (1826), 3 Bing. 635, there was such an express agreement.

(*g*) *Danube Co.* v. *Xenos* (1863), 13 C. B., N. S. 825.

accept the refusal as final the charterer may retract it, and may begin to load at any time before the lay-days have expired (*h*).

In such a case, if the contract becomes illegal before the lay-days have expired (*i*), such illegality will absolve the charterer from the performance of his contract, even though he has expressly refused to load before the contract becomes illegal, provided that the owner has not previously accepted such a refusal as final (*h*).

Case 1.—A. by his agent agreed to carry C.'s goods in his ship, the shipment to commence on August 1. On July 21, A. wrote to C. saying that his agent had no authority to make the contract; on July 23, A. still repudiated it, but offered a substituted contract. C. gave A. notice that he would hold A. bound by the original contract, but that if A. failed to perform it, C. would make other arrangements. On August 1, A. wrote that he was prepared to ship the goods, making no reference to the original contract. C. declined, having made other arrangements. *Held*, that C. had a right to treat A.'s repudiation as a final breach (*k*).

Case 2.—An English ship was chartered to proceed to X. and there load a cargo in forty-five running days. The vessel was ready to load on March 9; between March 9 and April 1 the charterer repeatedly refused to load, but the captain stayed on at X. ready to load. On April 1, and before the expiration of the running days, war broke out between England and Russia; the captain finally sailed on April 22. *Held*, that as the captain had never accepted the refusal to load as final, the charterer had the whole of the running days to perform his contract in, and if before then its performance became illegal, he was discharged (*h*).

Demurrage: see Section IX., Articles 128–135, *post*.
Loading in fixed time: see Article 131, *post*.
Loading in reasonable time: see Article 132, *post*.
Loading with customary despatch: see Article 133, *post*.

Article 45.—*Loading*.

Stipulations as to loading or unloading in a charter or bill of lading are to be construed with reference to the customs

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(*h*) *Reid* v. *Hoskins* (1856), 6 E. & B. 953.
(*i*) As in *Esposito* v. *Bowden* (1857), 7 E. & B. 763; *Avery* v. *Bowden* (1856), 6 E. & B. 953, 962.
(*k*) *Danube Co.* v. *Xenos* (1863), *vide supra*. This case follows the principle of *Hochster* v. *De la Tour* (1853), 2 E. & B. 678; *Frost* v. *Knight* (1872), L. R. 7 Ex. 114, discussed in *Johnstone* v. *Milling* (C.A.) (1886), 54 L. T. 629.

of the port of loading or discharge (*l*), unless such customs contradict or vary express stipulations in the charter or bill of lading (*m*).

The practice of one or some merchants at a port will not make a custom (*n*), but where the practice is universally followed at the port, it will bind even persons ignorant of it (*o*) unless inconsistent with the written documents (*p*).

Case 1.—A ship was chartered to load at X. "a full and complete cargo of sugar, molasses, $\frac{\text{and}}{\text{or}}$ other lawful produce." Evidence was tendered of a custom at X. that a full cargo of sugar and molasses meant a cargo composed of particular kinds of package, *i.e.* hogsheads of sugar, and puncheons of molasses *Held*, admissible (*q*).

Case 2.—A ship was chartered to load at X. coal and coke "in regular turns." The loading of coal at X. is regulated by statute.—*Held*, that evidence as to the custom at X. of loading coke was admissible to explain "in regular turns" (*r*).

Case 3.—A charter was made "on condition of the ship's taking a cargo of not less than 1000 tons of weight and measurement." *Held*, that the relative proportions of "weight and measurement goods" were to be determined by the usage of the port of loading (*s*).

Case 4.—A ship was chartered to proceed to X. and there load in the customary manner a full and complete cargo of M. coke, "to be loaded in regular turn." The vessels for M. coke were loaded by the M. Colliery in the order of their entry in a book, and not of their readiness to load, and this ship was so loaded. The jury found that the ship was loaded according to the practice of the M. Colliery, but that it was not an established or known custom, and that "regular turn" meant "order of readiness," not "order of entry on the book." *Held*, that the charterer was liable for demurrage (*t*).

(*l*) *Carali* v. *Xenos* (1862), 2 F. & F. 740, seems to show that it may not be sufficient to follow the usual custom of the docks, if unusual damage can be prevented from occurring by special exertion.

(*m*) Lord Blackburn, in *Postlethwaite* v. *Freeland* (1880), L. R. 5 App. C. 599, at p. 613, who curiously enough omits the qualification that the custom must not contradict the writing: *Cuthbert* v. *Cumming* (1856), 11 Ex. 405; *Leidemann* v. *Schultz* (1853), 14 C. B. 38; *Pust* v. *Dowie* (1864), 5 B. & S. 20; *The Skandinav* (1882), 51 L. J. Ad. 93. See also *Benson* v. *Schneider* (1817), 7 Taunt. 272; *Nielsen* v. *Neame* (1884), 1 C. & E. 288.

(*n*) *Lawson* v. *Burness* (1862), 1 H. & C. 396; *Newall* v. *Royal Exchange Co.* (1885), 33 W. R. 342, 868.

(*o*) *King* v. *Hinde* (1883), 12 Ir. L. R. 113; *Robertson* v. *Jackson* (1845), 2 C. B. 412; *Hudson* v. *Ede* (1868), L. R. 3 Q. B. 412. See note to Article 8, p. 19, *ante*.

(*p*) *Hudson* v. *Clementson* (1856), 18 C. B. 213; *Coverdale* v. *Grant* (1884), L. R. 9 App. C. 470, 478; *Hillstrom* v. *Gibson* (1870), 8 Sc. Sess. Cas., 3rd Series, 463, where the words in the original printed charter, "deliver according to the custom of the port," had been struck out of the charter.

(*q*) *Cuthbert* v. *Cumming* (1856), 11 Ex. 405.

(*r*) *Leidemann* v. *Schultz* (1853), 14 C. B. 38.

(*s*) *Pust* v. *Dowie* (1864), 5 B. & S. 20. See note to Article 46, as to "weight and measurement."

(*t*) *Lawson* v. *Burness* (1862), 1 H. & C. 396.

Case 5.—A sailing vessel was chartered to proceed to X. for coals and load "in regular turn"; there is only one colliery at X., and the practice of that colliery is to supply steamers in their order of readiness, and sailing vessels in their order, but to postpone sailing vessels to steamers; and this applies to all coal vessels at X. The owner was ignorant of this usage. *Held*, that this usage was a custom of the port, and that "regular turn" was to be construed according to it, the owner's ignorance being immaterial (*u*).

Case 6.—A ship was chartered to proceed to Algiers with coal, "the lay-days reckoning from the time of the vessel being ready to unload and in turn to deliver." The coals were shipped for the French Government, though the shipowner did not know it, and by their regulations, such coals might only be discharged at a particular place, and in a particular order. *Held*, that evidence of usage was admissible to explain "in turn to deliver," and that the Government regulation, being binding on all such vessels, must be taken as an usage of the port, the shipowner's ignorance being immaterial (*x*).

Case 7.—A ship was chartered to proceed to X. and load grain; all grain is brought to X. from U., ninety miles up river, by water; this universal custom of the port was well known in the grain trade, but not to the shipowner. *Held*, that he was bound by it (*y*).

Article 46.—*To load a full and complete Cargo.*

"Full and complete cargo" means a full and complete cargo according to the custom of the port of loading (*z*). It does not in the absence of custom give the charterer any right to carry passengers in the cabins (*a*).

Where a vessel is chartered as of a certain capacity, and the charterer undertakes to load a "full and complete cargo," he cannot limit his liability by the capacity named in the charter, but must load as much cargo (*b*) as the ship will carry with safety (*c*).

But where a certain number of tons is stipulated for in the clause as to "cargo," that number and not the actual capacity of the vessel will constitute the approximate measure of the charterer's obligation (*d*). The charterer is bound to put on

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(*u*) *King* v. *Hinde*, 11 Ir. L. R. C. L. 113.
(*x*) *Robertson* v. *Jackson* (1845), 2 C. B. 412.
(*y*) *Hudson* v. *Ede* (1868), L. R. 3 Q. B. 412.
(*z*) *Cuthbert* v. *Cumming* (1856), 11 Ex. at p. 409; and see Article 45.
(*a*) *Shaw Savill* v. *Aitken* (1883), 1 C. & E. 195.
(*b*) "Cargo" usually means an entire shipload: *Kreuger* v. *Blanck* (1870), 5 L. R. Ex. 179; *Borrowman* v. *Drayton* (1877), L. R. 2 Ex. D. 15.
(*c*) *Hunter* v. *Fry* (1819), 2 B. & Ald. 421.
(*d*) *Morris* v. *Levison* (1876), 1 C. P. D. 155; *Alcock* v. *Leeuw* (1884), 1 C. & E. 98.

board goods equivalent to the cargo stipulated for, or to a full and complete cargo, though, owing to their destruction before the ship sails, they may not all be carried in the ship (*e*).

Where the ship is stowed in a manner that does not make full use of her hold, but the charterer or his agents saw the stowage and made no objection, the shipowner will not be liable for not loading a full and complete cargo (*f*).

Note.—The term "tonnage" refers to register tons of 100 cubic feet, and has no reference to weight.

The term "tons" by itself would mean a weight of 20 cwt., but the full phrase "ton of 20 cwt." is generally used.

The term "tons weight or measurement," means that goods shipped are to be taken either by weight of 20 cwt., or by measurement of 40 cubic feet, a measure probably derived from the measure of 20 cwt. of salt water, (= 35·7 cubic feet, the balance being the allowance for the hull carrying it). Whether goods are to be treated as weight or measurement goods for freight, is at the option of the shipowner. See for the meaning of the phrase in a charter, *Pust* v. *Dowie* (*g*).

The number of tons of 20 cwt. a vessel will lift is called her "dead weight capacity," for short, "dead weight," "d. w.," or "capacity."

Case.—A vessel was chartered "to load a full and complete cargo of iron, say about 1100 tons." The actual tonnage of the ship was 1210 tons. The charterer furnished 1080 tons. *Held*, that the charterer was only bound to load "about 1100 tons," that 3 per cent. was a fair margin; hence that he should have loaded 1133 tons (*h*).

Article 47.—Broken Stowage.

Where there is a charter "to load a full and complete cargo," if the cargo loaded leaves room that may be filled

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(*e*) Thus in *Jones* v. *Holm* (1867), L. R. 2 Ex. 335, where when a ship had loaded part of her cargo she caught fire, and the cargo on board being damaged had to be sold; *Held*, that the charterer was not bound to replace the damaged cargo, but was bound to supply so much as would with the damaged cargo make a "full and complete cargo." But see *Strugnell* v. *Friedrichsen*, 12 C. B., N. S. 452 (1862), when the discharge of three quarters of the cargo under similar circumstances by the master's request, and at the charterer's expense, was held to free the charterer from any further liability.

(*f*) *Hovill* v. *Stephenson* (1830), 4 C. & P. 469.

(*g*) *Pust* v. *Dowie*, *vide supra*.

(*h*) *Morris* v. *Levison* (1876), 1 C. P. D. 155. Now (1886) a cargo of so many tons, "or thereabouts," is frequently taken to allow a margin of 5 per cent.

with "broken stowage," such broken stowage must be provided (*i*) unless the custom of the port of loading does not require it (*i*).

Case.—A ship was chartered "to load at X., a full and complete cargo of sugar, molasses, $\frac{\text{and}}{\text{or}}$ other produce. The charterer filled the ship with sugar in hogsheads and molasses in puncheons, but did not fill up with broken stowage. Evidence of a custom at X., that "full and complete cargo of sugar and molasses," meant cargo so stowed without broken stowage, *held* admissible, and the custom reasonable. *Held*, therefore, that the charterer had fulfilled his obligation (*k*).

Article 48.—*Deck Cargo.*

Goods are to be loaded in the usual carrying places (*l*).

The shipowner or master will only be authorized to stow goods on deck: (1) by a custom binding in the trade or port of loading, to stow on deck goods of that class on such a voyage (*m*); or (2) by express agreement with the shipper of the particular goods so to stow them (*n*).

The effect of deck stowage not so authorized will be to set aside the exceptions of the charter or bill of lading, and to render the shipowner liable under his contract of carriage for damage happening to such goods (*o*).

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either way. In *Alcock* v. *Leeuw* (1884), 1 C. & E. 98, a charter to ship "empty petroleum barrels as required by the master, say about 5000," was held to allow the master 10 per cent. margin on either side of 5000.

(*i*) *Cole* v. *Meek* (1864), 15 C. B., N. S. 795; see also *Duckett* v. *Satterfield* (1868), 3 L. R., C. P. 227.

(*k*) *Cuthbert* v. *Cumming* (1856), 11 Ex. 405.

(*l*) *Mitcheson* v. *Nicoll* (1852), 7 Ex. 929: see *post*, Articles 90, 110. Where a ship was chartered, charterers to have "the full reach of the vessel's hold from bulkhead to bulkhead, including the half-deck;" *Held*, that the freight for goods stowed on deck was due to the shipowners. *Neill* v. *Ridley* (1854), 9 Ex. 677.

(*m*) Such as existed in *Gould* v. *Oliver* (1837), 4 Bing. N. C. 134, and was attempted to be proved in *Newall* v. *Royal Exchange Co.* (1885), 33 W. R. 342, 868.

(*n*) As in *Burton* v. *English* (1883), 12 Q. B. D. 218; *Wright* v. *Marwood* (1881), 7 Q. B. D. 62; *Johnson* v. *Chapman* (1865), 19 C. B., N. S. 563.

(*o*) *Newall* v. *Royal Exchange Co.*, *vide supra*. This case is also reported in 1 Times, L. R 178, 490, but in neither report are the grounds of the judgment very clear. Before Cave, J., at the trial, it was assumed that there was a binding custom to load on deck at the shipowner's risk: Cave, J., held that this custom excluded the terms of the bill of lading; that therefore the shipowner was liable as a common carrier, but that as the goods, owing to the custom, were properly stowed on deck, the master was the agent of the shipper in making a jettison, and the shipper's only right was to a general average contribution. In the Court of Appeal it was held that there was no such binding custom, that therefore the

The peculiar position of goods stowed on deck puts them in a special relation to claims for general average (*p*).

Case 1.—A ship was chartered to carry a "full and complete cargo." *Held*, that the charterer was not entitled to load goods in the cabin (*q*).

Case 2.—Cotton was shipped under a bill of lading, excepting "jettison" and "stranding." The cotton was shipped on deck improperly (the attempt to prove a custom to do so failing); owing to the ship's stranding, the cotton was jettisoned, such jettison itself being proper. *Held*, that, the goods being improperly stowed, the shipowner was not protected by the exceptions (*r*).

Article 49.—*Ballast and Dunnage.*

The shipowner having to furnish a seaworthy ship is bound to provide sufficient ballast and dunnage to make the ship seaworthy (*s*), and cannot require the charterer to provide such a cargo as will render it unnecessary for the shipowner to load ballast (*t*).

The shipowner may carry freight paying merchandise as ballast, if it takes no more room than ballast would have done, and does not interfere with the cargo shipped by the charterer (*u*).

Note.—Dunnage is the name given to the provision made in stowage to protect goods from damage from contact with the bottom or sides of the vessel by the use of various articles.

Case 1.—A ship was chartered "to load a full and complete cargo of

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goods were improperly stowed on deck, and the master had not the authority of the shipper to jettison them; that consequently the remedy of the shipper was not for a general average contribution; and that the shipowner could not protect himself by the exceptions in the bill of lading, apparently because those exceptions only applied to goods properly stowed. It is now (October, 1886) under appeal to the House of Lords.

(*p*) *Vide post*, Articles 90, 110.

(*q*) *Mitcheson* v. *Nicoll*. *vide supra*.

(*r*) *Newall* v. *Royal Exchange Co.*, *vide supra*.

(*s*) The charterer sometimes contracts to ship ballast at ship's expense; and if so, may, in the absence of express stipulation, be liable for delay in such shipment: see for such stipulation, *Sanguinetti* v. *Pacific SteamNavigation Co.* (1877), L. R. 2 Q. B. D. 238.

(*t*) *Moorsom* v. *Page* (1814), 4 Camp. 103; *Irving* v. *Clegg* (1834), 1 Bing. N. C. 53; *Southampton Colliery Co.* v. *Clarke* (1870), L. R. 6 Ex. 53.

(*u*) *Towse* v. *Henderson* (1850), 4 Ex. 890. *Semble*, the shipowner may use cargo as ballast or dunnage, provided it can be so stowed as to take no harm, though this will rarely happen: hence *dictum* of Sir R. Phillimore in *The Marathon* (1879), 40 L. T. 163, at p. 166.

copper, tallow, hides, or other goods" (*v*). The charterer provided tallow and hides, but no copper. In consequence the ship had to keep in her ballast and so lost freight. *Held*, that the charterer was justified in shipping such a cargo (*w*).

Case 2.—A ship was chartered "to carry a full and complete cargo of merchandise, 100 tons of rice or sugar to be shipped previous to any other cargo as ballast." The charterer completed the loading with such light goods that more than 100 tons of ballast were required. *Held*, that the shipowner must supply it (*x*).

Article 50.—*Loading and Stevedores.*

In the absence of custom or express agreement it is the duty of the owner by his master to receive and properly stow the cargo, which is brought alongside at the risk and expense of the shipper (*y*). If the master or shipowner himself directs the stowage he is bound to exercise the same skill as a properly qualified stevedore (*z*). If he fail to do so, the shipper has an action against the owner and master (*y*).

As between shipper and shipowner, the employment of a stevedore by the owner does not relieve him from liability under his contract to carry as contained in the bill of lading, and unless protected by express agreement, he will therefore be liable for damage done in or by negligent stowage (*a*), though he will have his remedy against the stevedore.

If there is a charter, the shipper who is ignorant of the charter will be entitled to sue the owner for bad stowage (*a*); a shipper aware of the charter can only sue the charterer (*b*).

(*v*) For other cases on special charters as to proportion of goods to be shipped, see *Cockburn* v. *Alexander* (1848), 6 C. B. 791; *Warren* v. *Peabody* (1849), 8 C. B. 800; *Capper* v. *Forster* (1837), 3 Bing. N. C. 938; *Southampton S. Colliery Co.* v. *Clarke* (1870), L. R. 6 Ex. 53.

(*w*) *Moorsom* v. *Page* (1814), 4 Camp. 103.

(*x*) *Irving* v. *Clegg* (1834), 1 Bing. N. C. 53.

(*y*) *Blaikie* v. *Stembridge* (1859), 6 C. B., N. S. 894; *Sandemann* v. *Scurr* (1866), L. R. 2 Q. B. 86.

(*z*) *Anglo-African Co.* v. *Lamzed* (1866), L. R. 1 C. P. 226; *Swainston* v. *Garrick* (1883), 2 L. J., N. S. Ex. 255, and see note 1.

(*a*) *Sandemann* v. *Scurr*, *vide supra*, at p. 98; *The Figlia Maggiore* (1868), L. R. 2 Ad. 106; *The St. Cloud* (1863), B. & L. 4; *Hayn* v. *Culliford* (1879), L. R. 4 C. P. D. 182.

(*b*) *St. Cloud* (1863), B. & L. 4; *Newberry* v. *Colvin* (1832), 1 Cl. & Fin. 283; see also per Bramwell, L.J., in *Wagstaff* v. *Anderson* (1880), L. R. 5 C. P. D. at p. 177, 178; and Parke, B., in *Major* v. *White* (1835), 7 C. & P. at p. 43; see Article 18 b.

In all these cases it will be a good defence to show that the shipper was aware of the method of stowage, and made no objection (*c*).

Whether the charterer or owner is ultimately liable for bad stowage will depend on the terms of the charter as to stowage, but either the charterer or owner will have his remedy against the stevedore, unless the damage results from defaults in gear supplied by the ship (*d*).

The owner who has employed a stevedore is not liable to persons damaged in the course of the stevedore's work, unless the damage results from default in gear supplied by the ship. In any other case, their remedy, if any, is against the stevedore (*e*).

Note 1.—This seems to conflict with the principle that the employer of an independent contractor incurs no liability for the acts of the contractor and his servants; and it is certainly opposed to the *dictum* of Willes, J., in *Murray* v. *Currie* (*e*). "The shipowner would not have been liable to the charterer (shipper), if the wrongful act of the stevedore had caused damage to any part of the cargo." But the principle is subject to exceptions, as when the act is unlawful or in its nature dangerous, or is work which the employer is bound by statute or common law to perform, or is controlled or interfered with and directed by the employer (*f*). Now it is clear that the work of loading is one which the carrier is legally bound to perform under his contract of carriage, and he cannot get rid of his liability by employing an independent contractor, though he may have a remedy over against the contractor. Persons, however, damaged by the contractor's negligence, apart from the contract of carriage, can only sue the contractor, and this is the explanation of *Murray* v. *Currie* (*e*); as the work was not so dangerous *per se* as to bring it within the exception, nor did the employer control the contractor's work. The ordinary directions to a stevedore, as to where he should stow goods, not involving instructions as to how he should stow them, will not be sufficient to bring the employer within this exception. The *dictum* of Willes, J., must therefore, it is submitted, be taken as unsound.

(*c*) *Hovill* v. *Stephenson* (1830), 4 C. & P. 469; *Ohrloff* v. *Briscall* (1866), L. R. 1 P. C. 231; *Major* v. *White*, *vide supra*.

(*d*) See cases, *sub*, and notes. The owner is primarily liable to pay the stevedore. See *Eastman* v. *Harry* (1876), 33 L. T. 800.

(*e*) *Murray* v. *Currie* (1870), L. R. 6 C. P. 24.

(*f*) See Macdonell on "Master and Servant," pp. 262–270.

Case 1.—A ship was chartered by C., to load a cargo not exceeding what the ship could reasonably carry, "C.'s stevedore to be employed by the ship, and the cargo . . . . to be brought alongside at C.'s risk and expense." C. did not appoint a stevedore, and the owners did not load a full cargo. *Held*, that the condition that C. should appoint a stevedore was not a condition precedent; that even if he did not, the owners and their master were bound to take on board as much cargo as the ship could reasonably carry, and that the master was bound to use the same skill as a qualified stevedore in stowing it (*g*).

Case 2.—C. chartered a ship from A., with a clause, "stevedore of outward cargo to be appointed by charterer, but to be paid by and act under captain's orders." Other shippers, knowing of the charter, shipped goods, which were stowed by the stevedore appointed by the charterer; the captain did not interfere with their stowage. *Held*, that the shipper could not sue the master for bad stowage (*h*).

Case 3.—A. chartered a ship to C., to sail to X., and load from C.'s agents there, "cargo to be stowed at merchants' risk and expense." Goods were shipped by F., ignorant of the charter. The stevedore was appointed by the charterers, though ultimately paid by owners. *Held*, that F. could sue A. on bills of lading signed by the master (*i*).

Case 4.—K., a stevedore, in unloading A.'s ship, employed L., a member of A.'s crew, assigned to him by A., but under the orders of and paid by K. Through L.'s negligence, M., a fellow-workman, was injured. *Held*, that K. and not A., was liable (*k*).

Case 5.—C. sued A. and E. his captain, for negligent stowage of A.'s ship, chartered by C., whereby she carried less cargo than she might have done. A. proved that C. and his broker were on board from time to time during the loading, and made no objection to it. *Held*, a good defence (*l*).

Note.—For the practice in loading general ships in London, Liverpool, Glasgow, Bristol, and Hull, see Appendix II., *post*.

(*g*) *Anglo-African Co.* v. *Lamzed* (1866), L. R. 1 C. P. 226.

(*h*) *Blaikie* v. *Stembridge* (1859), 6 C. B., N. S. 894, followed by Sir R. Phillimore in *The Catharine Chalmers* (1875), 32 L. T. 847, which, however, it is difficult to reconcile with *Omoa Coal Co.* v. *Huntley* (1877), L. R. 2 C. P. D. 464. In *Sack* v. *Ford* (1862), 13 C. B., N. S. 90, the ship was chartered with a clause; "the charterers are to have liberty to employ stevedore and labourers to assist in the loading and stowage and discharge of the cargo; but such stevedores being under the control and direction of the master, the charterers are not in any case to be responsible to the owners for damage or improper stowage . . . . the liability of owners shall remain the same as if they were carrying out a voyage on their own account." The charterers sued the owners for negligent stowage and succeeded. This clause is a very special one, apparently framed to avoid the decision in *Blaikie* v. *Stembridge*, and the decision is very strong, seeing that the charterers actually paid the stevedores themselves. See also *The Helene* (1865), B. & L. 415.

(*i*) *Sandemann* v. *Scurr* (1866), L. R. 2 Q. B. 86. *Semble*, that A. could sue C. for any damages F. recovered from him.

(*k*) *Murray* v. *Currie* (1870), L. R. 6 C. P. 24.

(*l*) *Ohrloff* v. *Briscall* (1866), L. R. 1 P. C. 231: but the knowledge of the lighterman who brought the goods to the ship will not be sufficient to affect the shipper: *Figlia Maggiore* (1868), L. R. 2 A. & E. 106.

Article 51.—*Mate's Receipt.*

On delivery of goods by a shipper to the shipowner or his agent, the shipper will, unless there is a custom of the port to the contrary (*m*), obtain a document known as a "*mate's receipt.*" Apart from special contract (*n*) the goods are then in the shipowner's possession and at his risk (*o*).

As a general rule the person in possession of the mate's receipt, where one exists, is the person entitled to bills of lading, which should be given in exchange for that receipt, and he can sue for wrongful dealing with the goods. The shipowner will be justified in delivering bills of lading to him if he has received no notice of and does not know of other claims (*p*).

But the mate's receipt is also a recognition of property in any person named therein as owner, an acknowledgment that the shipper holds the goods on his account (*q*). The master will therefore be justified in delivering bills of lading to such a person; or to a person proved to be owner of the goods (*r*), even though the mate's receipt is not produced, if he has received no notice of other claims and is satisfied the goods are on board (*s*).

Mere indorsement or transference of the mate's receipt without notice to the shipowner or his agent does not pass the property in the goods, and a custom to that effect has been held bad (*s*).

Statements in the mate's receipt are not conclusive against

(*m*) Thus in the port of London, a "mate's receipt" is only given for water-borne goods, and not for goods sent to the docks by land. For these latter the corresponding document is the *wharfage note* issued by the dock company, who receive a *mate's receipt* from the ship. See Appendix II.

(*n*) See Note to this Article.

(*o*) *British Columbia Co.* v. *Nettleship* (1868), L. R. 3 C. P. 499; *Cobban* v. *Downe* (1803), 5 Esp. 41.

(*p*) *Craven* v. *Ryder* (1816), 6 Taunt. 433; *Thompson* v. *Trail* (1826), 6 B. & C. 36; *Falk* v. *Fletcher* (1865), 18 C. B., N. S. 403.

(*q*) *Evans* v. *Nichol* (1841), 3 M. & G. 614; *Craven* v. *Ryder* (1816), 6 Taunt. 433. The majority of receipts do not contain an owner's name.

(*r*) *Cowasjee* v. *Thompson* (1845), 5 Moore, P. C. 165.

(*s*) *Hathesing* v. *Laing* (1873), L. R. 17 Eq. 92. In practice lightermen and agents frequently detain the *mate's receipt* as security for disputed accounts; but shipowners in these cases often disregard the *mate's receipt* and deliver bills of lading to the shipper.

the shipowner, but throw on him the burden of disproving them (*t*).

Note.—The bill of lading sometimes provides expressly when the ship's responsibility shall commence; *e. g.* "when goods are taken in from a lighter, when the goods are over the ship's deck level with the rail;" or "it is expressly stipulated that the goods mentioned in this bill of lading, while awaiting shipment on any quay or lighter in Liverpool, shall be at risk of shipper."

The shipowner usually requires, as a condition of his assuming liability for the goods, that they shall be correctly marked, *e. g.*: "The shippers to mark each package before shipment with the name of the port of destination in letters of two inches in length at least, otherwise the owners to be free from all responsibility for the goods"; or, "The ship will not be responsible for correct delivery, unless each package be distinctly, correctly, and permanently marked by the merchant before shipment with a mark, number, and address, and also with the name of the port of delivery, which last must be in letters not less than two inches long" (*u*).

Case 1.—F., shippers, delivered to A.'s servants on the quay goods for shipment by A.'s vessel alongside, and received a mate's receipt: one of the cases was left behind. *Held*, that A. was liable for its loss (*v*).

Case 2.—F. sold sugar *f. o. b.* to H.: F. shipped the sugar on A.'s ship, receiving a "mate's receipt"—"Received on board the X. for and on account of F." H. resold to K.; K. obtained bills of lading from A.'s captain. Before the ship sailed H. failed. F. claimed to stop *in transitu*. The jury found that by shipping under the mate's receipt F. did not intend to divest his lien. *Held*, that F. was entitled to the bills of lading, and not K., the property being still in F. (*x*).

Case 3.—F. sold goods to H. *f. o. b.*, took a bill from H. in payment, and shipped them on A.'s ship, getting mate's receipt. H. failed while the bill was running. F. claimed to stop *in transitu*. A.'s captain had made out the bills of lading in H.'s name, without production of mate's receipts. *Held*, that F. being absolutely paid by bill (*y*), the right to stop *in transitu* was gone; that the property was therefore in G., and that the possession by F. of the mate's receipts was immaterial (*z*).

Case 4.—H., acting as agents for C. F., bought goods and shipped them in A.'s vessel, chartered to C. F., obtaining a mate's receipt for them. C. F. indorsed the receipts to H., who kept them as security for their pay-

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(*t*) *Biddulph* v. *Bingham* (1874), 30 L. T. 30.

(*u*) For an example of the working of a similar exception, see *Cox* v. *Bruce* (1886), 2 Times L. R. 598.

(*v*) *British Columbia Co.* v. *Nettleship* (1868), L. R. 3 C. P. 499. The delivery must be to a recognised agent of the shipowner, as master, mate, super-cargo, or dock company, not merely on board the ship, or to the crew. *Cobban* v. *Downe* (1803), 5 Esp. 41; *Mackenzie* v. *Rowe* (1810), 2 Camp. 482.

(*x*) *Craven* v. *Ryder* (1816), 6 Taunt. 433.

(*y*) See Article 64.

(*z*) *Cowasjee* v. *Thompson* (1845), 5 Moore, P. C. 165.

ment by C. F., but gave no notice to A.'s captain. C. F. obtained bills of lading from the captain, and indorsed them to a bank. The bank and H. both claimed the goods. H. set up a custom of Bombay that mate's receipts were negotiable instruments, indorsement of which passed the property, and that captains were bound not to give bills of lading except on the production of the mate's receipt. *Held*, that such a custom was bad; that A.'s captain, knowing C. F. to be the owners of the goods, and having no notice of any other claim, was justified in giving bills of lading to C. F., and that the holders of the bills of lading had precedence over the holders of the mate's receipts (*a*).

Case 5.—F. shipped goods in A.'s ship, and received a mate's receipt: "Received on board the A. from F., to be delivered to G." F. had arranged with G. that these goods should be consigned to him as security for advances, and forwarded the receipt to G. F. failed, and A. claimed a lien on the goods for other debts due from F. to A. *Held*, that G., as holder of the mate's receipt, acknowledging that the goods were held to be delivered to him, was entitled to sue A. for the goods (*b*).

Case 6.—C. verbally chartered a ship from A., and loaded in it iron supplied by H. A.'s mate gave a receipt for 330 tons; there was no bill of lading. On arrival there were only 326½ tons of iron. C. had paid H. for 330 tons, on the mate's receipt. C. sued A. for the price of 3½ tons short. A.'s mate proved that he had delivered all he had received. *Held*, that A. was not liable, the mate's receipt being only *primâ facie* evidence, which A. could contradict (*c*).

Article 52.—*Shipped in good condition.—Weight, value, and contents unknown.—Quality and quantity unknown.*

The insertion of either of these clauses in the bill of lading by the master or broker repudiates his liability for any description of the weight or contents of the goods contained in the bill of lading; but he is bound to carry and deliver safely the goods received by him, whatever their contents or weight may be (*d*).

These clauses only admit as against the shipowner that a package was shipped externally to all appearances in good condition (*e*).

If such goods are delivered damaged the shipper must give *primâ facie* evidence either that they were shipped in

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(*a*) *Hathesing* v. *Laing* (1873), 17 L. R. Eq. 92.
(*b*) *Evans* v. *Nichol* (1841), 3 M. & G. 614.
(*c*) *Biddulph* v. *Bingham* (1874), 30 L. T. 30.
(*d*) *Jessel* v. *Bath* (1867), 2 L. R. Ex. 267; *Lebeau* v. *General Steam Navigation Co.* (1872), L. R. 8 C. P. 88.
(*e*) *The Peter der Grosse* (1875), L. R. 1 P. D. 414, but see *Witzler* v. *Collins* (1879), 35 Am. Rep. 327.

good condition internally, or that the damage resulted from some external cause within the control of the shipowner (*f*).

Case 1.—D., C.'s broker, signed a bill of lading to F. for thirty-three tons of manganese; the bill contained the printed words, "Weight, contents, and value unknown." On arrival the ship only delivered twenty-six tons, and it was admitted that no more had been shipped. *Held*, that such a bill only meant "a certain quantity of manganese has been shipped, which for purposes of freight is said by the shipper to amount to so much, but I do not pretend or undertake to know whether that statement of weight is correct" (*g*).

Case 2.—F. delivered to A. for shipment goods described in the bill of lading F. tendered for signature as "linen goods." A.'s captain signed the bill of lading, after stamping it, "Weight, value, and contents unknown." The goods were really silk goods, the misdescription being inadvertent and not fraudulent. In transit two pieces of silk were lost, and F. claimed their value from A. *Held*, that the effect of the words stamped was to do away with the description in the bill of lading, the contract being to carry the package whatever its contents might be and declining to be bound by any statement of its contents, and that A. was therefore liable (*h*).

Case 3.—Goods were shipped under a bill of lading, "Shipped in good order and condition . . . weight, contents, and value unknown." They were delivered dirty externally, and damaged obviously from some external source. *Held*, that the bill of lading was evidence that externally the goods had been shipped in good order and condition to the eye, and that, as it was proved *primâ facie* that the damage resulted from some external source, the goods shipowners to free themselves must prove that the goods were damaged when shipped (*i*).

Case 4.—Cotton seed was shipped under a bill of lading "in good order and well conditioned; quantity and quality unknown." *Held*, that to render the shipowner liable for the delivery of damaged goods, the shipper must prove either shipment in good condition or damage sustained on the voyage through fault of the shipowner (*f*).

(*f*) *The Ida* (1875), 32 L. T. 541. *The Prosperino Palasso* (1873), 29 L. T. 622; which however is reversed in *The Ida*, so far as it laid down as a rule of law that the shipper must always prove affirmatively good condition on shipment. He must *primâ facie* negative inherent vice of the goods, which he can do by showing that the damage is obviously due to an external cause. See also *Williams* v. *Dobbie* (1884), 11 Sc. Sess. Cases, 4th Ser. 982. If the evidence leaves it doubtful whether the damage was due to an excepted peril or not, the shipowner will not be liable, unless some negligence on his part is shown which may have caused the damage: *Muddle* v. *Stride* (1840), 9 C. & P. 380, *sed quære*. The non-arrival of the vessel at her destined port is not even *primâ facie* evidence of negligence. *Boyson* v. *Wilson* (1816), 1 Stark. 236. The arrival of the vessel, but non-arrival of the goods is such *primâ facie* evidence: *The Xantho* (1886), 2 Times L. R. 704.

(*g*) *Jessel* v. *Bath* (1867), 2 L. R. Ex. 267. See also *Tully* v. *Terry* (1873), L. R. 8 C. P. 679; *Covas* v. *Bingham* (1853), 2 E. & B. 836, where, on a sale of cargo afloat by bill of lading, *Held*, that payment was to be made on the amount in the bill of lading, and not the amount actually delivered; and Article 141, *post*.

(*h*) *Lebeau* v. *General Steam Navigation Co.* (1872), L. R. 8 C. P. 88. The case of *Bradley* v. *Dunipace* (1862), 1 H. & C. 521, which caused much difference of judicial opinion at the time, is doubtful law now.

(*i*) *The Peter der Grosse* (1875), L. R. 1 P. D. 414. If the damage had not been obviously external, the shipper must have connected it in some way with the shipowner. *The Ida* (1875), 32 L. T. 541.

Article 53.—*Cesser Clause.*

Charters, especially those made by English agents for foreign consignees, frequently contain a clause to the effect that the charterer's liability shall cease on shipment of the cargo. This clause, known as the "lien and exemption clause," or "cesser clause" (*k*), is usually inserted in consideration of the granting to the shipowner of a lien, which he would not otherwise possess, on the cargo for demurrage and dead freight (*l*).

The tendency of the Courts is to hold that the exemption granted to the charterer is co-extensive with the lien thus conferred on the shipowner (*m*).

Where therefore no lien at all has been granted to the shipowner, the Courts have been slow to relieve the charterer from liabilities arising before the shipment of the cargo (*n*); but where the words make it clear that such was the intention of the parties, they have held the charterer relieved (*o*), even though the effect of such a decision was to leave the shipowner without remedy (*p*).

(*k*) *E.g.*: "This charter being entered into on behalf of others, all liability of the parties signing to cease after shipment of cargo, in consideration of which it is agreed that for the payment of all freight, dead freight, and demurrage, the said owner shall have an absolute lien and charge on the said cargo."

(*l*) See Article 161.

(*m*) "It seems impossible to hold that the matters, as to which the liability was to cease, were not the same as the matters as to which the lien was given;" *per* Bramwell, B., in *Francesco* v. *Massey* (1873), L. R. 8 Ex. at p. 106. "The clause making the charterer's liability to cease must exactly coincide with the lien:" *per* Amphlett, B., in *Kish* v. *Cory* (1875), L. R. 10 Q. B. at p. 563, see also pp. 559, 562, *per* Brett, J., and Pollock, B. See also *Gray* v. *Carr* (1871), L. R. 6 Q. B. at p. 544, and *French* v. *Gerber* (1877), L. R. 2 C. P. D. at p. 250.

(*n*) *Christoffersen* v. *Hansen* (1872), L. R. 7 Q. B. 509.

(*o*) *Oglesby* v. *Yglesias* (1858), E. B. & E. 930; *Milvain* v. *Perez* (1861), 3 E. & E. 495.

(*p*) It is clear that the charterer is relieved by the cesser clause from liabilities accruing after the shipment of the cargo; there has been a conflict of opinion whether he was in addition relieved from liabilities accruing before such shipment; and, though the authorities now establish that he is, if a corresponding lien is given to the shipowner, yet several judges, and notably the present Master of the Rolls, while recognizing that the authorities are so, have thought that on principle the decisions should have been the other way. See *per* Brett, J., in *Gray* v. *Carr*, L. R. 6 Q. B. at p. 537, and in *Kish* v. *Cory* (1875), L. R. 10 Q. B. at p. 559; also *per* Coleridge, L.C.J., in the latter case, at p. 557, and *per* Grove, J., at p. 562; but as the latter learned Judge says: "The authorities however are too strong to be overruled even by a Court of Error."

Similarly where a lien has been granted to the shipowner the Courts have held the charterer excused from claims for which the shipowner has a lien (*q*) or some other security on the cargo (*r*), but have treated him as liable for claims for which the shipowner has no such lien (*s*), or which the express words of the clause show that he was intended to be liable for (*t*).

The fact that the charterer is also the consignee of the cargo will not destroy his exemption under such a clause (*u*), unless he is consignee under a bill of lading incorporating and so reviving the liabilities of the charter, when the cesser clause will be held inapplicable to the new contract as regards liabilities accruing after the shipment of the cargo (*x*).

Note.—The chief difficulty in the interpretation of the clause arises from the term "demurrage," which strictly means an agreed and certain sum payable under the contract for delay beyond the agreed lay-days; but may also loosely be taken to mean the unliquidated damages payable for breach of the implied covenant to load within a reasonable time, known in law as "damages for detention" (*y*), and the term appears often to be used commercially in this wider sense.

The cases, though contradictory, appear to yield the following rules, as to charters containing a "cesser clause," and a lien for "demurrage."

Article 54.—*Demurrage and Cesser Clause.*

Where no demurrage in the strict sense of the term (*z*) is stipulated for in the provisions as to lay-days, but a lien for demurrage is given by the cesser clause to the shipowner;

(*q*) *Francesco* v. *Massey* (1873), L. R. 8 Ex. 101; *Kish* v. *Cory* (1875), L. R. 10 Q. B. 553; *Bannister* v. *Breslauer* (1867), L. R. 2 C. P. 497; *Sanguinetti* v. *Pacific Steam Navigation Co.* (1877), L. R. 2 Q. B. D. 238.

(*r*) *French* v. *Gerber* (1877), L. R. 2 C. P. D. at p. 250.

(*s*) *Lockhart* v. *Falk* (1875), L. R. 10 Ex. 132; *Francesco* v. *Massey*, *vide supra*.

(*t*) *Lister* v. *Van Haansbergen* (1876), L. R. 1 Q. B. D. 269; *Pederson* v. *Lotinga*, (1857), 28 L. T. 267.

(*u*) *Sanguinetti* v. *Pacific Steam Navigation Co.* (1877), L. R. 2 Q. B. D. 238.

(*x*) *Gullischen* v. *Stewart* (1884), 13 Q. B. D. 367 (demurrage at port of discharge); *Bryden* v. *Niebuhr* (1884), 1 C. & E. 241 (demurrage at port of call); which, it is submitted, overrule *Barwick* v. *Burnyeat* (1877), 36 L. T. 250.

(*y*) *Gray* v. *Carr* (1871), L. R. 6 Q. B. 544, 551.

(*z*) Agreed damages to be paid for the delay of the ship in loading or unloading beyond an agreed period, such delay not being caused by default of the shipowner.

such a lien will include damages for detention at the port of loading, and the charterer will not therefore be liable for such damages (*a*).

Where demurrage in the strict sense of the term is stipulated for in the charter, after provisions as to both loading and discharging, it applies to both: if then a lien for demurrage is given together with a cesser clause, such a lien applies only to demurrage in the strict sense (*b*) [and not to damages for detention beyond the agreed days on demurrage] (*c*). The charterer will therefore be freed from liability for demurrage at the port of loading (*d*) [but not for damages for detention at the port of loading (*e*)] (*f*).

Where there is a stipulation for demurrage at the port of discharge, but none at the port of loading, the term "demurrage" can only be taken to apply to the port of discharge; and the shipowner will therefore have no lien for damages for detention at the port of loading, while the charterer will be liable for such damages (*g*).

Note.—These rules may also be put in another way. Where a lien for demurrage is given to the shipowner by a charter containing a "cesser clause," the charterer will be freed by the "cesser clause" from all liability for demurrage or detention at the port of discharge.

At the port of loading his liabilities will vary according to the stipulations of the charter as to demurrage. Stipulations for demurrage at the port of loading may be either:— (*h*)

(1.) *Exhaustive*: as "ten days for loading, and demurrage at £2 per diem afterwards," which provides for all delay.

(2.) *Partial*: as "ten days to load, ten days on demurrage at £2 per diem," when all delay after twenty days will give rise to "damages for detention;" or "demurrage at £2 per diem" (*i*), when demurrage will begin at a time unascertained, except that such time must be reasonable.

(3.) *None*: as "ten days to load," or "load according to the

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(*a*) *Bannister* v. *Breslauer* (1867), L. R. 2 C. P. 497; see *sub.* p. 111
(*b*) *Kish* v. *Cory* (1875), L. R. 10 Q. B. 553.
(*c*) *Gray* v. *Carr* (1871), L. R. 6 Q. B. 522.
(*d*) *Francesco* v. *Massey* (1873), L. R. 8 Ex. 101; *Kish* v. *Cory*, *vide supra*.
(*e*) *Gray* v. *Carr*; *Francesco* v. *Massey*, *vide supra*.
(*f*) The parts in brackets are disputed: see note *sub.*
(*g*) *Lockhart* v. *Falk* (1875), L. R. 10 Ex. 132.
(*h*) See also Article 121, *post*.
(*i*) Cf. *Harris* v. *Jacobs* (1885), 15 Q. B. D. 247.

custom of the port," or simply "load," where all delay will be met by damages for detention.

With regard, then, to the port of loading:—

(1). If there is an *exhaustive* stipulation for demurrage, the charterer will be freed from it by the cesser clause, the shipowner having a co-extensive lien: *Sanguinetti* v. *Pacific Steam Navigation Company* (*j*).

(2.) If there is a *partial* stipulation for demurrage, the charterer will be freed from his liability for demurrage: *Kish* v. *Cory* (*k*); *Francesco* v. *Massey* (*l*); but as the shipowner has no lien for damages for detention, *Gray* v. *Carr* (*m*), the charterer will not be freed from his liability for it: *Francesco* v. *Massey* (*l*).

(3.) If there is no stipulation for demurrage at the port of loading, but there is one for the port of discharge, the shipowner will not have any lien for damages for detention at the port of loading: *Gray* v. *Carr* (*m*); the charterer will not be freed from his liability for them: *Lockhart* v. *Falk* (*n*).

(4.) If there is no stipulation for demurrage either at the port of loading or port of discharge, but a lien for demurrage, it will be construed to give the shipowner a lien for damages for detention at the port of loading, and therefore to excuse the charterer from liability for such damages: *Bannister* v. *Breslauer* (*o*).

Case 1.—A ship was chartered by C. to load coals at X. in regular turn and proceed to Z., "and that the charter being concluded by C. on behalf of another party resident abroad, all liability of C. should cease as soon as he had shipped the said cargo." No lien was given to the shipowner. *Held*, that this clause only freed C. from liability for breaches of the charter occurring after the loading, and not for breaches occurring before the shipment of the cargo (*p*).

Case 2.—A ship was chartered to load in regular turn in the customary manner . . . . "this charter being concluded by C. on behalf of another party resident abroad, it is agreed that all liability of C. in every respect

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(*j*) (1877) L. R. 2 Q. B. D. 238.
(*k*) (1875), L. R. 10 Q. B. 553.
(*l*) (1873), L. R. 8 Ex. 101.
(*m*) (1871), L. R. 6 Q. B. 522.
(*n*) (1875), L. R. 10 Ex. 132.
(*o*) (1867), L. R. 2 C. P. 497; but see note, p. 111.
(*p*) *Christoffersen* v. *Hansen* (1872), L. R. 7 Q. B. 509. This case has been supported in later cases; *e.g.*, *Francesco* v. *Massey* (1873), L. R. 8 Ex. at p. 105; by the fact that no lien was given to the shipowner, and it could not be supposed that he was to lose all remedy, unless there was a very clear indication of that intention. Lush, J., in the former case, says: "if there were any provision giving the shipowner an equivalent advantage that would be a very good reason for his absolving the charterer altogether." But though the case is now supported on this ground, at the time, following *Pederson* v. *Lotinga* (1857), 28 L. T. 267, it was treated as an application of the principle, now discredited by authority, though favoured by some judges (see note *sub*), that the cesser clause freed from liability for breaches arising after loading, but not from those occurring before its completion.

and as to all matters and things *as well before* as during and after the shipping of the cargo shall cease as soon as he has shipped the cargo." *Held*, that by this clause the charterers, on shipment of the cargo, were protected from liability for delay in loading (*q*).

Case 3.—A ship was chartered by C. "to load in fifteen working days, the vessel to be discharged at the rate of thirty-five tons per working day, and ten days on demurrage over and above her said lay-days, C.'s liability to cease when ship is loaded, the captain having a lien upon the cargo for freight and demurrage." A claim was made against C. for five days' demurrage, and fourteen days' detention beyond the days on demurrage. On the trial C. was held liable both for demurrage, and for damages for detention. He appealed as to demurrage, admitting he was liable for damages for detention. *Held*, that as the owner had a lien for demurrage, C. was not liable for it (*r*).

Case 4.—A ship was chartered by C. to carry rice, calling at a port for orders "to be forwarded within forty-eight hours after notice of her arrival had been given to and received by charterer's agents in London, or lay-days to count . . . . Liability of C. to cease as soon as cargo is on board, provided the same is worth the freight at port of discharge, but the owners of the ship to have an absolute lien on the cargo for all demurrage." C. delayed orders at the port of call, and ordered the ship to a port which was not good and safe. *Held*, that C. was exonerated by the cesser clause, the term "lay-days to count" giving the owner some protection by his lien on the cargo (*s*).

Case 5.—A ship was chartered to load in the customary manner, proceed to Z. and then deliver, "the cargo to be discharged in ten working days. Demurrage at £2 per 100 tons register per diem. The ship to have an absolute lien on cargo for freight and demurrage, the charterer's liability to any clauses in this charter ceasing when he has delivered the cargo alongside ship." The ship was delayed in loading. *Held*, that demurrage in the clause giving the lien only applied to demurrage at the port of discharge, and that the charterer was therefore liable for damages for detention at the port of loading (*t*).

Case 6.—A ship was chartered to load a full and complete cargo . . . . "this charter being concluded by C. for and on account of another party, it is agreed that all liability of C. shall cease as soon as the cargo is shipped, loading excepted, the owner agreeing to rest solely on his lien on the cargo for freight, demurrage, and all other claims." *Held*, that the charterers were liable for delay in loading (*u*).

Case 7.—A ship was chartered by C. "to load and unload with all despatch . . . . C.'s liability to cease when the cargo is shipped, provided the same is worth the freight on arrival at the port of discharge, the captain having an absolute lien on it for freight and demurrage." *Held*,

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(*q*) *Milvain* v. *Perez* (1861), 3 E. & E. 495. See also *Oglesby* v. *Yglesias* (1858), E. B. & E. 930.

(*r*) *Francesco* v. *Massey* (1873), L. R. 8 Ex. 101. See also *Kish* v. *Cory* (C.A., 1875), L. R. 10 Q. B. 553.

(*s*) *French* v. *Gerber* (C.A., 1877), L. R. 2 C. P. D. 247.

(*t*) *Lockhart* v. *Falk* (1875), L. R. 10 Ex. 132.

(*u*) *Lister* v. *Van Haansbergen* (1876), L. R. 1 Q. B. D. 269. This case turns on express evidence of intention in the words "loading excepted." So also *Pederson* v. *Lotinga* (1857), 28 L. T. 267, may be supported as turning on a clause to pay demurrage at the port of loading, day by day, and is so construed by Blackburn, J., in *Christoffersen* v. *Hansen* (1872), L. R. 7. Q. B. at p. 514.

that demurrage applied to delay at the port of loading, that the owner had therefore a lien for it, and that the charterer was not liable for it (*x*).

Note.—Lord Bramwell piquantly described this class of cases as "cases where no principle of law is involved, but only the meaning of careless and slovenly documents" (*y*). There is, however, an important conflict of principles of construction. The earlier cases seem to have proceeded on the view that the *cesser clause* only freed the charterer from his liability for breaches occurring after the shipment of the cargo, unless an intention to free him from liability for previous breaches was clearly shown: *Milvain* v. *Perez* (*z*). Later and more authoritative construction has, in all cases where a lien has been given to the shipowner, freed the charterer from liability for breaches before shipment of cargo, to the extent of the lien, unless an intention to render him liable was clearly shown; it has sometimes even stated the principle as if the clause freed the charterer on shipment of the cargo from his liability for all breaches, whether before the shipment or after.

That the charterer's exemption should be co-extensive with the shipowner's lien has several times been clearly stated (*a*). But if this is to be consistently applied to the claims for or in the nature of demurrage, either (1) *there must be a lien for damages for detention in loading, under the name of "demurrage"*; (for if there is not, and the charterer is freed from liability for all breaches before the shipment of cargo, he is freed from liability for damages for detention in loading, while the shipowner has no corresponding lien on the cargo to indemnify him); or (2) *the charterer must, in spite of the cesser clause, still be liable for damages for detention at the port of loading:* for if he is not, the shipowner, having no lien for such damages, is also precluded by the cesser clause from his remedy against the charterer, and thus has a wrong without a remedy.

This difficulty was recognised by Brett, J., and Amphlett, B., in *Kish* v. *Cory* (*b*); but the decision of the point was not necessary to the case, and Amphlett, B., therefore declined to express any opinion, while Brett, J., and Coleridge, C.J., held the view that the first alternative, a lien for damages for detention, under the name of "demurrage," or, in wider terms, a lien to the shipowner for whatever claims the charterer is exempted from, would be adopted when the case arose. Cleasby, B., suggested the second alternative. The question has not yet clearly arisen, but, whichever alternative is adopted, the cases are so contradictory

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(*x*) *Bannister* v. *Breslauer* (1867), L. R. 2 C. P. 497. This case has been much doubted, but never formally overruled. See *sub.* p. 111.
(*y*) L. R. 6 Q. B. at p. 549.
(*z*) (1861), 3 E. & E. 495.
(*a*) *Vide supra*, p. 101, note (*m*).
(*b*) (1875), L. R. 10 Q. B. 553.

that its adoption will render necessary the overruling of several decided cases.

For in *Gray* v. *Carr* (1871) (*c*) four judges in the Exchequer Chamber expressly held that the clause, "the owners to have an absolute lien for demurrage on the cargo," did not give the owners a lien for damages for detention at the port of loading, as distinguished from demurrage there; and Brett, J., who, with Willes, J., dissented on another point, said nothing to qualify this, but put forward as his own view that the cesser clause only freed the charterer from liabilities arising after loading. In that case a ship was chartered to load at X. in "fifty running days for loading, to be discharged as fast as ship can put cargo out, and ten days on demurrage at £8 per day. The owners to have an absolute lien on the cargo for all . . . demurrage . . . charterer's liability to cease on shipment of the cargo." Cargo was shipped under bills of lading to be delivered as *per* charter to G., "he paying freight, and all other conditions, or demurrage, if any should be incurred for the goods, as *per* charter." The vessel was detained ten days on demurrage in loading at X., and eighteen days beyond. At the port of discharge the master claimed against the consignees a lien for demurrage for ten days and for damages for detention for eighteen days. It thus became essential to determine what lien the master had by charter, before ascertaining how much of the charter the bill of lading incorporated. And four judges (*d*) expressly held that the shipowner under such a charter had a lien for demurrage, but not for damages for detention. In *Francesco* v. *Massey* (*e*) the Court below had held the charterer liable for damages for detention, and though he appealed successfully against another part of their judgment, he did not appeal on this point, on which the Court had followed *Gray* v. *Carr*. And in *Lockhart* v. *Falk* (*f*) the Court expressly held that demurrage in the clause giving the lien must be confined to demurrage in the strictest sense of the term.

The suggested lien is open to the further objection that it is a lien for unliquidated damages, the objections to which in shipping cases have been pointed out most forcibly by Brett, J., himself in *Gray* v. *Carr* (*g*).

On the other hand, in favour of the first alternative are the remarks of Coleridge, C.J., and Brett, J., in *Kish* v. *Cory* (*h*); the *dicta* of Mellish, L.J., and Brett, L.J., in *Sanguinetti* v.

(*c*) L. R. 6 Q. B. 522.

(*d*) Cleasby, B., at pp. 527, 528. Channel, B., p. 544. Bramwell, B., p. 551. Kelly, C.B., p. 556.

(*e*) L. R 8 Ex. 101; C. A. (1873).

(*f*) L. R. 10 Ex. 132, 136 (1875).

(*g*) At p. 535. The construction put by Brett, J., on "*dead freight*" is curiously at variance with his view as to "*demurrage*." And see *Phillips* v. *Rodie* (1814), 15 East, 547, *et sub.* Article 161.

(*h*) (1875), L. R. 10 Q. B. (C.A.) 553.

Pacific Steam Navigation Co. (*i*), and the case of *Bannister* v. *Breslauer* (*j*). But in two of these cases the remarksof the learned judges on this point were not necessary for the decision, while the third case has been much questioned (*k*).

In *Kish* v. *Cory* (*l*) a ship was chartered "to be loaded in thirteen working days, and discharged at not less than thirty-five tons per working day. Ten days on demurrage above the said days. Charterer's liability to cease when ship is loaded, the captain having a lien on cargo for freight and demurrage." It was held, following *Francesco* v. *Massey*, that the charterer was not liable for demurrage in the strict sense at the port of loading, for which the shipowner had a lien. But in the course of the argument, Brett, J., raised the question of damages for detention, and some of the judges expressed opinions on the point, though it was not involved in the decision of the case. Coleridge, C.J., said: (*m*) "I am inclined to think that, even in a case where the shipowner sues for unliquidated damages for detention at the port of loading, and the charterer relies on the clause exempting him from liability, it will be held that the charterer's liability ceases on loading, and the lien attaches" (*n*). Brett, J., said: (*o*) "Three interpretations of the cesser clause may be suggested:—(1) That liability of every kind, as well for past as for future breaches, is to cease so far as charterer is concerned; (2) the charterer is exempted only from future liability, that is, after the loading of the ship; but in each case the shipowner can enforce his remedy against the consignee by his lien on the cargo; (3) the charterer's liability is to cease, but only a partial remedy is given to the shipowner by the lien against the consignee, that is, he can exercise his lien for demurrage, but not for detention. If this last were the legal interpretation of the clause, I should think it so unjust that I should be prepared to overrule former decisions upon which it is based (*p*), for I cannot think it would express the real intention of the parties; but I am inclined to think that the interpretation to be adopted at the present day is that the charterer's liability for past breaches is to cease upon loading the cargo, but the remedy of the shipowner is given against the consignee to the extent of his remedy against the charterer, that is to say, the lien is given in full for

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(*i*) (1877), L. R. 2 Q. B. D. (C.A.), 238.

(*j*) (1867), L. R. 2 C. P. 497.

(*k*) Brett, M.R., following his own remarks in *Sanguinetti* v. *Pacific Steam Co.*, gave a similar wide interpretation to "demurrage" in *Harris* v. *Jacobs* (1885), 15 Q. B. D. 247.

(*l*) (1875), L. R. 10 Q. B. (C.A.), 553.

(*m*) At p. 558.

(*n*) This of course is directly contrary to *Gray* v. *Carr* (1871), L. R. 6 Q. B. 522, which only seems to have been cited on an incidental point.

(*o*) At p. 559, 560.

(*p*) Surely not those of the Court of Appeal itself.

all breaches for which the shipowner would, but for this clause, have a remedy against the charterer. I know that in this case it is unnecessary to say that the lien is given for more than demurrage, properly so called, at the port of loading, but I cannot be a party to construing such a clause as this, and holding that it absolutely absolves the charterer from all liability, past as well as future, without considering what must take place were we also to hold that the lien were given simply for demurrage properly so called. . . It may be said that this difficulty may be obviated by holding that the liability of the charterer was to cease only in respect of the delay of the vessel during the demurrage days, and that the lien would attach to that only, and that, notwithstanding the clause of exemption, a right of action would remain against the charterer for delaying the ship at the port of loading beyond the demurrage days. That construction seems hardly consistent with the decisions in which it has been held that the charterer's liability is to cease for past breaches of the charter, at all events for the detention of the ship. *I feel certain that when the occasion arises it will be held*, upon a clause like this, containing a cesser of liability of the charterer and a lien for demurrage, that 'demurrage' includes not only demurrage proper, but also that which is in the nature of demurrage, viz. detention at the port of loading. . . *It is because I have future decisions in my mind* that I can construe this clause as a discharge of the liability of the charterer; otherwise I should be prepared to hold that the clause related only to breaches after the ship was loaded, and the charterer was liable for any breaches happening before."

We may respectfully submit that if the present Master of the Rolls had had the past decisions brought to his mind by counsel he would not have overlooked that it had been held, when the occasion had arisen (*r*), that a lien for "demurrage" did *not* include a lien for damages for detention.

Amphlett, B. (*s*) agreed with Brett, J., as to the alternatives, but declined to express an opinion as to which was the right one, as the question was unnecessary for the decision of the case. Grove, J., inclined to the opinion that the charterer was liable for breaches before shipment of cargo, but admitted that the authorities against him were so strong "that they could not be overruled even in a Court of Error." On the other hand Cleasby, B. (*t*) considered the charterer would not be released from liability for damages for detention, and Pollock, B., appeared to agree with him.

The authority of *Kish* v. *Cory* (*u*) appears therefore to stand thus: the point was unnecessary for the decision of the case,

(*r*) *Gray* v. *Carr* (1871), L. R. 6 Q. B. 522.
(*s*) *Kish* v. *Cory*, L. R. 10 Q. B. at p. 563.
(*t*) At p. 562.
(*u*) (1875), L. R. 10 Q. B. 553.

and did not properly arise in it. Two, possibly three, judges (*x*) expressly hold that a lien for demurrage should be construed to include damages for detention; two judges (*y*) apparently prefer the other alternative, that the charterer should be liable for damages for detention in spite of the cesser clause, and one (*z*) declines to pronounce an opinion. Moreover an express decision of the Court of Exchequer Chamber on the point (*a*) was not referred to by the judges.

The case of *Sanguinetti* v. *Pacific Steam Navigation Co.* (*b*) as an authority on this point stands in the same dubious position. In that case a ship was chartered to load coal "at X., at the rate of seventy-five tons per clear working day: stiffening coal if required, to be supplied at ship's expense, and at the rate of forty tons per clear working day; all days on which stiffening coal is taken on board to be excluded from the computation of the said working days allowed for loading. The vessel to be discharged at the rate of forty tons per clear working day .... Demurrage to be paid for each day beyond the said days allowed for loading and discharging at 3*d.* per ton per *diem*, the master to have a lien for the cargo for all demurrage due under this agreement. All liability of the charterers under this agreement shall cease as soon as the cargo is on board .... the owner and masters to have a lien on the cargo for all demurrage."

A delay of forty-eight days in all happened during the loading, a great part of which was in loading stiffening coal. If therefore the demurrage clause applied to loading such coal, the whole of the delay would be covered by the lien for demurrage. All the judges held that the demurrage clause did so apply, and that as the shipowner was fully protected by his lien, the charterer was not liable. This decided the case, but the Court also dealt with the supposition that the demurrage clause did not apply, and that the delay in loading stiffening coal would give rise to a claim for damages to detention. In this supposed state of the case Mellish, L.J., appears to hold, though not very decidedly, that the shipowner would have a lien for the damages for detention, under the term "demurrage" (*c*). Amphlett, B., does not express any opinion, and Brett, L.J., takes the same view (*d*) he had taken in *Kish* v. *Cory*. Again, *Gray* v. *Carr* is not noticed by the Court; and this case, (the only clear opinion on the point, and that *obiter*, being that of Brett, L.J., who had previously expressed the same opinion,) does not much strengthen the position against *Gray* v. *Carr*.

We come lastly to the much criticised case of *Bannister* v. *Breslauer* (*e*). In this case, which was decided on demurrer,

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(*x*) Coleridge, C.J., Brett, J., possibly Grove, J.
(*y*) Cleasby and Pollock, B.B.
(*z*) Amphlett, B.
(*a*) *Gray* v. *Carr*.
(*b*) (1877), L. R. 2 Q. B. D. 239.
(*c*) At p. 247.
(*d*) At p. 252.
(*e*) (1867), L. R. 2 C. P. 497.

the charter contained the clauses: "Cargo to be loaded and unloaded with all despatch .... the charterer's liability on this charter to cease when the cargo is shipped, the owner having an absolute lien on it for . . . demurrage." There was no provision in the charter for the payment of "demurrage" under that name. The vessel was detained in loading, and the owners sued the charterer for damages for detention. The judges (*f*) held that the charterer was discharged, on the view apparently that the owner had a lien for damages for detention, under the name of "demurrage." They barely notice the difference between the two.

This case has been severely criticised. In *Gray* v. *Carr* (*g*) Brett, J., thought "the interpretation of the charter in that case too severe," and that the charterer was not absolved, though the learned judge then based the charterer's liability on the principle that the cesser clause only freed the charterer from liabilities incurred after shipment of cargo, which seems now bad law. He however suggested that there was in the charter a clause as to demurrage at the port of discharge, which the wording of the report of the case negatives. Channel, B. (*h*) "thought the decision somewhat doubtful, if the charterer was held liable for damages for detention," (as was the case). Bramwell, B. "respectfully intimated his doubt of the decision;" (*i*) and the majority of the Court held that the shipowner had not a lien for damages for detention under the names of demurrage. In *Francesco* v. *Massey* (*j*), Cleasby, B. adopted the case without noticing the difficulty, and Bramwell, B., said: "Though that case has been questioned it has not been overruled, and is binding on us." In *Kish* v. *Cory* (*k*) Coleridge, C.J., said: "The reasoning on which that case was decided has been questioned, and perhaps on strict examination does not appear perfectly accurate, but it seems to me the decision was perfectly right."

If the case is to stand it can only be on the narrow ground that, there being no demurrage clause in the charter, the lien for demurrage must have been intended to apply to damages for detention, as otherwise it would be meaningless. On this ground it is distinguished in *Lockhart* v. *Falk* (*l*), and on this ground I have treated it as law on the text. But I cannot see how it is compatible with *Gray* v. *Carr*, an express decision of the Court of Exchequer Chamber, with the remarks of Brett, J., and other judges in that case on the occurrence of words in these

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(*f*) M. Smith, Byles, J.; Keating, J., with some doubt.
(*g*) L. R. 6 Q. B. at p. 537.
(*h*) *Ib.*, p. 546.
(*i*) *Ib.*, p. 549.
(*j*) (1873), L. R. 8 Ex. 101.
(*k*) (1875), L. R. 10 Q. B. 553 at p. 558.
(*l*) (1875), L. R. 10 Ex. 132.

mercantile documents on printed forms, to which no meaning need be attached (*m*), and the inconvenience there suggested of a lien on cargo for unliquidated damages. It may perhaps be justified as a strict application of the "cesser clause," even though there was no corresponding lien; but this is not the ground of the judgments.

Notwithstanding the great authority of the present Master of the Rolls, with some slight support from other judges, it is hard to see how the Courts in face of *Gray* v. *Carr* (*n*) can fail to hold, where there is a demurrage clause in the charter, that the lien for demurrage does not include a lien for damages for detention.

The first alternative being thus disposed of, the second is that the charterer should still be liable for detention in loading, in spite of the "cesser clause." Assuming that there is no lien for damages for detention, the adoption of this alternative would carry out the principle that the charterer's exemption should be co-extensive with the shipowner's lien, at the expense of the strict interpretation of the clause. This alternative has been adopted in *Lockhart* v. *Falk* (*o*), where the charterer was held liable for damages for detention at the port of loading: it was also acted on in *Francesco* v. *Massey* (*p*), where the charterer did not dispute his liability for such damages for detention, and, to some extent, in *Christoffersen* v. *Hansen* (*q*), where, in the absence of a lien for demurrage, the charterer was held liable for demurrage at the port of loading in spite of the cesser clause. The only clear opinion against it is the *obiter dictum* of Brett, J., in *Kish* v. *Cory* (*r*), where he says: "That construction seems hardly consistent with the decisions in which it has been held that the charterer's liability is to cease for past breaches of the charter on shipment of the cargo." But the only case in which it has been held that the charterer's liability is so to cease without any corresponding lien is *Milvain* v. *Perez* (*s*); and there the cesser clause had the very strong words, "all liability *as well before* as during and after the shipping of the cargo shall cease," showing a very clear intention to apply the cesser clause strictly.

As the result it seems that the principle to follow is, that the charterer's exemption should be co-extensive with the shipowner's lien, and that as the existence of a lien is governed by principles of law, or by express agreement, the lien should be the chief factor in the couple. That therefore where there is no lien, as in the case of unliquidated damages in the absence of express agreement, there should be no exemption for the char-

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(*m*) See Article 9, *ante*.
(*n*) (1871), L. R. 6 Q. B. 537.
(*o*) (1875), L. R. 10 Ex. 132.
(*p*) (1873), L. R. 8 Ex. 101.
(*q*) (1872), L. R. 7 Q. B. 509.
(*r*) (1875), L. R. 10 Q. B. 553.
(*s*) (1861), 3 E. & E. 495.

terer. This is opposed to the view that the charterer should be held freed by the cesser clause from all claims, and therefore that the shipowner's lien should be made co-extensive with his exemption.

The adoption of this principle involves disapproval of the *obiter dicta* in *Kish* v. *Cory* (*t*), and in *Sanguinetti* v. *Pacific Steam Navigation Co.* (*u*), and a careful restriction of the application of *Bannister* v. *Breslauer* (*x*), which, in view of the direct authorities on the point which we have cited, does not seem without justification (*y*).

(*t*) (1875), L. R. 10 Q. B. 553.
(*u*) (1877), L. R. 2 Q. B. D. 239.
(*x*) (1867), L. R. 2 C. P. 497.
(*y*) For discussion of the question by the Scotch Courts, see *Beynon* v. *Kenneth* (1881), 8 Sc. Sess. Cases, 4th Series, p. 594; *Lamb* v. *Kaselack* (1882), 9 Sc. Sess. Cases, 4th Series, p. 482; *Salvesen* v. *Guy* (1885), 13 Sc. Sess. Cases, 4th Series, p. 85.

SECTION V.

The Bill of Lading as a Document of Title.

Article 55.—*Signature of the Bill of Lading.*

After the shipment of goods under a contract of affreightment, the bill of lading (*a*), which, where there is no charter, constitutes the most important evidence of the contract of affreightment, is signed by the carrier or his agent (*b*), and delivered to the shipper. Such signing does not give rise to any new contract, but only gives precision to one which had been previously made.

The signature and delivery of the bill of lading creates a document, subsequent dealings with which may have effects on the property in the goods shipped.

Article 56.—*Indorsement of Bill of Lading.*

Goods shipped under a bill of lading may be made deliverable to a named person, G., or to a name left blank, or "to bearer," and in the first two cases may or may not be made deliverable "to order or assigns."

Bills of lading making goods deliverable "to order," or "to order or assigns" are by mercantile custom negotiable instruments, the indorsement and delivery of which may affect the property in the goods shipped (*c*).

(*a*) The shipper has usually obtained the printed form of the bill of lading used by the shipowner, and has filled in the details before presenting it; it is checked by the shipowner or his broker and then signed.

(*b*) Usually in London for steamers, the loading broker, or the person doing his work; for sailing ships, usually the master; abroad, either the branch house, or agent, of the line or the master.

(*c*) Custom of merchants, as found in the special verdict in *Lickbarrow* v. *Mason* (1794), 5 T. R. 683; discussed by Lords Selborne and Blackburn, in *Sewell* v. *Burdick* (1884), L. R. 10 App. C. 74; and in Blackburn on Sale, 1st ed. pp. 282–289.

Indorsement is effected either by the shipper or consignee writing his name on the back of the bill of lading, which is called an "indorsement in blank," or by his writing "Deliver to I. [or order], F.," which is called an "indorsement in full" (*d*).

So long as the goods are deliverable to a name left blank, or to bearer, or the indorsement is in blank, the bill of lading may pass from hand to hand by mere delivery, or may be re-delivered to the original holder without any indorsement, so as to affect the property in the goods (*e*).

But the holder of the bill may at any time fill in the blank either in the bill or indorsement, or restrict by indorsement the delivery to bearer, such power being given to him by the delivery to him of such a bill of lading (*d*).

Semble.—A bill of lading which does not contain some such words as, "to order," or "to order or assigns," or which is indorsed in full, but without such words (*f*) is not a negotiable instrument (*g*).

Note.—Where goods are to be carried under a through bill of lading, separate bills of lading are sometimes signed for the conveyance of goods on subsequent stages of the transit. In these bills of lading the company, or the shipowner signing the through bill of lading appears as the shipper, and there is indorsed on the bills, "Delivery to be made to the holders of the original bill of lading duly indorsed, per ss. *S.*, from X., dated ." This is done to prevent conflicting claims to the goods from two sets of bills of lading for the same goods being in circulation.

Article 57.—*Effects of Indorsement.*

The indorsement and delivery of a bill of lading by the person entitled to hold it have effects depending partly on custom and partly on statute.

(*d*) See note (*c*), *ante*, p. 114.

(*e*) *Per* Lord Selborne in *Sewell* v. *Burdick*, L. R. 10 App. C. at p. 83. The inference that an assignment of property is contemplated will be weaker from an indorsement in blank than from one in full.

(*f*) *I.e.*, "deliver to."

(*g*) *Henderson* v. *Comptoir d'Escompte de Paris* (1873), L. R. 5 P. C. 253, at p. 260.

I.—*By mercantile custom* (*h*) such an indorsement and delivery of a bill of lading, made after shipment of the goods and before complete delivery of their possession has been made to the person having a right under the bill of lading to claim them (*i*), transfers such property (*j*), as it was the intention of the parties to the indorsement to transfer (*k*).

II.—*By the Bills of Lading Act* (*l*), the indorsee of a bill of lading, to whom under the particular circumstances of the indorsement the property in the goods shipped under the bill of lading passes, has all the rights and duties of the original shipper under the contract evidenced in the bill of lading (*m*).

III.—*By the Admiralty Jurisdiction Act*, indorsement of the bill of lading may give to the indorsee rights of action in the Court of Admiralty against the carrying ship (*n*).

Article 58.—*Effects of Indorsement on Property by Mercantile Custom.*

The presumed intention of the parties in indorsing a bill of lading may vary widely according to the circumstances.

It may be an intention:—

1. To absolutely transfer the property in the goods (*o*), subject only, if the price be unpaid, to the right of the unpaid vendor (*p*) to stop the goods in their transit to the vendee, as a means of asserting his lien on the goods for the price unpaid, known as the right of Stoppage *in transitu* (*q*).

(*h*) As stated in the special verdict in *Lickbarrow* v. *Mason* (1794), 5 T. R. 683. See note (*c*), *ante*.

(*i*) *Barber* v. *Meyerstein* (1870), L. R. 4 H. L. 317. Wrongful delivery of the goods apart from the bill of lading, does not render the bill ineffective as a symbol of property; and its indorsement, even after such wrongful delivery, may still pass the property; *Short* v. *Simpson* (1866), L. R. 1 C. P. 248.

(*j*) Strictly speaking, the property is transferred, not by the indorsement, but by the contract under which the indorsement is made: See *per* Lord Bramwell, 10 App. C., at p. 105.

(*k*) *Sewell* v. *Burdick* (1884), L. R. 10 App. C. 74, and see Article 58.

(*l*) (1855), 18 & 19 Vict. c. 111, *vide post*, Appendix III.

(*m*) *Sewell* v. *Burdick*, *vide supra*, and see Article 75.

(*n*) (1861), 24 Vict. c. 10, § 6, *vide post*, Article 77, and Appendix III.

(*o*) See Article 59.

(*p*) See Article 60.

(*q*) See Articles 63–71.

2. To pass the property on certain conditions, as on the acceptance of bills of exchange for the price (*r*).

3. To effect a mortgage of the goods as security for an advance (*s*).

4. To effect a pledge of the goods for the same purpose (*t*).

5. To pass no property at all in the goods (*u*).

Note.—The decision in *Sewell* v. *Burdick* (*x*) has made it clear that the effect of the indorsement of a bill of lading depends entirely on the particular circumstances of each indorsement, and that there is no general rule that indorsement passes the whole legal property in the goods, as had been strongly contended by Brett, M.R. (*y*), in the Court below, and in *Glyn, Mills, & Co.* v. *East and West India Docks* (*z*). In the light of this decision, the special verdict in *Lickbarrow* v. *Mason* (*a*), which recites that "the property is transferred by indorsement," must be read "the property which it was the intention to transfer is transferred;" (*b*) and many *obiter dicta* on the subject, such as the statement of Lord Hatherley in *Barber* v. *Meyerstein* (*c*), that, when goods are at sea, assigning the bill of lading is parting with the "whole and complete ownership of the goods," and of Lord Westbury in the same case (*c*), that the transfer of the bill of lading for value "passes the absolute property in the goods," must be taken as overruled, or strictly limited to the circumstances of the particular case (*d*).

Article 59.—*Intention to transfer the whole Property by Indorsement of the Bill of Lading.*

Property in goods at sea may be completely passed by indorsement and delivery of the bill of lading under which they are shipped, in exchange for payment of the price.

Note 1.—The question of property in goods shipped is not of great importance to the shipowner, as he is safe in delivering to the holder of the first bill of lading duly presented, if he has no

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(*r*) See Articles 61, 62.
(*s*) See Article 72.
(*t*) See Article 73.
(*u*) See Article 74.
(*x*) (1884) L. R. 10 App. C. 74.
(*y*) 13 Q. B. D. at p. 167.
(*z*) (1880) 6 Q. B. D. at p. 480.
(*a*) (1794) 5 T. R. 683.
(*b*) As suggested by Lord Selborne, L. R. 10 App. C. at p. 80.
(*c*) (1870) L. R. 4 H. L. 325, 335.
(*d*) See L. R. 10 App. C. at pp. 81, 104.

notice or knowledge of other claims (*e*), while if he has such knowledge, though probably in strict law he must either deliver at his peril to the rightful claimant, or interplead (*f*); yet in practice he can almost always obtain in exchange for delivery of the goods an indemnity against legal proceedings, which will render him virtually safe. For this reason I have not gone minutely into the numerous cases on this subject. An exhaustive discussion of them will be found in Benjamin on Sale, 3rd ed. pp. 328–354, and a summary of the results at p. 352. Part of this summary has been approved by the House of Lords (*g*), and a similar summary is to be found in the judgment of Cotton, L.J., in *Mirabita* v. *Ottoman Bank* (*h*).

Note 2.—The property in goods shipped under a bill of lading may be passed without indorsement of such bill (*i*), and it would seem that subsequent indorsement of the bill of lading will have no effect. But see *Kemp* v. *Falk* (*k*).

Article 60.—*Unpaid Vendor's Securities.*

Where goods are shipped by a vendor, in pursuance of his buyer's order, for delivery to the buyer, such shipment *primâ facie* passes the property to the buyer, delivery to the ship being equivalent to delivery to him (*l*).

But under these circumstances the unpaid vendor has the right to stop the goods *in transitu* (*m*), though they are made by the bill of lading deliverable to the vendee (*n*).

An unpaid vendor frequently insists on more than this security for the price, and deals with the bill of lading so as to prevent the property in the goods from passing to the vendee on their shipment, either by—

(I.) Reserving to himself the *jus disponendi* (*o*).

(II.) Conditional indorsement of the bill of lading (*p*).

(*e*) *Glyn Mills* v. *West India Dock Co.* (1882), L. R. 7 App. C. 591; see Article 125.

(*f*) Per Lord Blackburn, 7 App. C. at p. 611.

(*g*) *Shepherd* v. *Harrison* (1871), L. R. 5 H. L. 116, at p. 127.

(*h*) (1878) L. R. 3 Ex. D. at p. 172.

(*i*) *Meyer* v. *Sharpe* (1813), 5 Taunt. 74; *Nathan* v. *Giles* (1814), 5 Taunt. 558.

(*k*) L. R. 7 App. C. 573.

(*l*) *Shepherd* v. *Harrison* (1871), L. R. 5 H. L. 116, at p. 127: and see Article 68.

(*m*) *Vide post*, Article 63.

(*n*) *Ex parte Banner* (1876), L. R. 2 Ch. D. 278, at p. 288.

(*o*) See Article 61.

(*p*) See Article 62.

Article 61.—*Reservation of Jus disponendi by Unpaid Vendor.*

1. The unpaid vendor may take from the master a bill of lading making the goods deliverable to his order or to his agent, and may forward this bill to his agent, with instructions not to indorse it to the vendee except on payment for the goods.

If he takes the bill in this form on his own behalf, and not as agent for, or on behalf of, the purchaser, he thereby reserves himself the power of absolutely disposing of the goods, known as the *jus disponendi*, and no property will pass to the purchasers by the shipment (*q*). Payment or tender of the price will pass the property to the purchasers (*r*), unless this *jus disponendi* has been reserved by the vendor for some other purpose than that of securing the contract price (*s*).

Note.—It has been discussed whether the *jus disponendi* is merely a vendor's lien, or is some right in the vendor concomitant with property in the vendee, or whether it amounts to a statement that the acts of the vendor prevent the property from passing to the vendee on shipment of the goods, and postpone the vesting of the property till certain conditions are satisfied. *Ogg* v. *Shuter* (*t*) shews that it is more than a vendor's lien. The judgment in *Mirabita* v. *Ottoman Bank* (*u*) declines to decide between the last two alternatives, but the language of Cotton, L.J., in the same case appears to shew that to speak of the vendor's *jus disponendi* is another way of saying that the property has not passed to the vendee, whatever may be his rights under the contract of sale.

Article 62.—*Conditional Indorsement by Unpaid Vendor.*

The unpaid vendor may draw a bill of exchange on the vendor for the price, and either:—

(I.) Forward it for acceptance, together with a copy of

(*q*) *Shepherd* v. *Harrison*, *vide supra*; *Mirabita* v. *Ottoman Bank* (1878), L. R. 3 Ex. D. at p. 172; *Ogg* v. *Shuter* (1875), L. R. 1 C. P. D. 47; *Gabarron* v. *Kreeft* (1875), L. R. 10 Ex. 274.

(*r*) *Mirabita* v. *Ottoman Bank*, *vide supra*.

(*s*) *Wait* v. *Baker* (1848), 2 Ex. 1.

(*t*) (1875), L. R. 1 C. P. D. 47.

(*u*) (1878), L. R. 3 Ex. D. 164.

the bill of lading (*x*), sending also an indorsed bill of lading to his agent (*y*); or,

(II.) Discount it at a bank, depositing an indorsed bill of lading as security for the advance, and leaving the bank to present the bill of exchange for acceptance, together with the bill of lading (*z*).

In case (I.) the vendee cannot retain the bill of lading, or obtain the indorsed bill of lading, unless he accepts the bill of exchange (*a*).

In case (II.), he cannot obtain the bill of lading from the bank unless he satisfies the bank's claim for advances (*b*); but if, before the bank realizes the goods to satisfy its claim, the vendee tenders the amount claimed, the property in the goods will at once pass to him (*c*), and he will be entitled to the bill of lading, unless the *jus disponendi* has been reserved by the vendor with some other intention than that of securing the contract price (*d*).

The vendee is not entitled to require delivery of all copies of the bill of lading before accepting bills of exchange, if the copy tendered is in fact effectual to pass the property; nor, *semble*, can he claim that they should be delivered at such a time that they can be forwarded to arrive at the port of destination before the ship, but only that the shipper shall forward them with all reasonable despatch (*e*).

In all these cases the vendor, by reserving the *jus dispo-*

(*x*) In *Coventry* v. *Gladstone* (1867), L. R. 4 Eq. 493, an attempt to set up a custom to deliver bills of lading, not when bills of exchange were accepted, but when they were paid, failed.

(*y*) *Shepherd* v. *Harrison* (1871), L. R. 5 H. L. 116.

(*z*) *Turner* v. *Trustees of Liverpool Docks* (1851), 6 Ex. 543. Where a bank presents a bill of exchange with bills of lading annexed, it is not taken to guarantee that the latter are genuine: *Leather* v. *Simpson* (1871), L. R. 11 Eq. 398; *Baxter* v. *Chapman* (1874), 29 L. T. 642.

(*a*) *Shepherd* v. *Harrison* (1871), L. R. 5 H. L. 116. For special facts under which the consignee who had received bills of lading was held not bound to accept bills of exchange drawn against them, see *Depperman* v. *Hubbersty* (1852), 17 Q. B. 766; for special facts in which the consignee was held to be bound, see *Imperial Ottoman Bank* v. *Cowan* (1874), 31 L. T. 336; *Hoare* v. *Dresser* (1859), 7 H. L. C. 290.

(*b*) *Turner* v. *Trustees of Liverpool Docks* (1851), 6 Ex. 543.

(*c*) *Mirabita* v. *Ottoman Bank* (1878), L. R. 3 Ex. D. 164.

(*d*) *Wait* v. *Baker* (1848), 2 Ex. 1. See also *Barber* v. *Taylor* (1839), 5 M. & W 527; *Gilbert* v. *Guignon* (1872), L. R. 8 Ch. 16.

(*e*) *Sanders* v. *Maclean* (1883), L. R. 11 Q. B. D. 327.

nendi, is ***primâ facie*** presumed to intend to retain the property in the goods (*f*), and the burden of disproving this intention lies on those who dispute it (*g*).

Case 1.—P. requested V. in Brazil to purchase cotton for him; V. did so and forwarded it to England, taking a bill of lading deliverable to V.'s order, and describing the cotton in the invoice as "shipped on account and at the risk of P." V. forwarded to his agent W., the invoice and two bills of lading; W. sent on to P. the invoice and one bill of lading, indorsed, and a bill of exchange for the price of the cotton. P. refused to accept the bill of exchange, but kept the bill of lading, which he handed to his brokers, who paid the freight on the cotton, and got a delivery order from the shipowners. Meanwhile, W. obtained delivery of the cotton under the second bill of lading. *Held*, that W.'s action had reserved to him the *jus disponendi*, and the property in the cotton; that P. could not keep the bill of lading without accepting the bill of exchange, and that W. was justified in taking possession of the cotton (*h*).

Case 2.—V. purchased goods in X., as agents for P. in England, with the proceeds of bills drawn by V. on P., and discounted in X. On shipping, V. took bills of lading making the goods deliverable to P., and forwarded them to P. by post, with notice of the bills of exchange drawn. While the goods were *in transitu*, P. became bankrupt, having accepted some of the bills, but having paid none. *Held*, that the property had passed absolutely to P., subject only to V.'s right to stop *in transitu* (*i*).

Case 3.—V. shipped guano to P., as the result of a correspondence, which objected to the proposed price, but asked the captain to bring some other goods as well. P. insured the cargo. V. took a bill of lading, making the goods deliverable to V., or order, but before it was indorsed to P., the ship was wrecked. The jury found that V. had intended the shipment to pass the property to P., and had not intended to keep the guano in his own hands; and this verdict was sustained by the Court, who *held* that the property was in P. from the shipment (*k*).

Case 4.—V. sold potatoes to P., payment to be by cash against bill of

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(*f*) The property and possession in goods shipped has been held to be transferred to the vendee on the facts of the following cases:—*Walley* v. *Montgomery* (1803), 3 East, 585; *Coxe* v. *Harden* (1803), 4 East, 211; *Ogle* v. *Atkinson* (1814), 5 Taunt. 759; *Wilmhurst* v. *Bowker* (1844), 7 M. & G. 882; *Key* v. *Cotesworth* (1852), 7 Ex. 595; *Joyce* v. *Swann* (1864), 17 C. B., N. S. 84; *Castle* v. *Playford* (1872), L. R. 7 Ex. 98; *Ex parte Banner* (1876), L. R. 2 Ch. D. 278; *Mirabita* v. *Ottoman Bank* (1878), L. R. 3 Ex. D. 164.

The property or possession was held to have been reserved by the vendor and shipper in the following cases:—*Craven* v. *Ryder* (1816), 6 Taunt. 433; *Ruck* v. *Hatfield* (1822), 5 B. & Ald. 632; *Brandt* v. *Bowlby* (1831), 2 B. & Ad. 932; *Ellershaw* v. *Magniac* (1843), 6 Ex. 570; *Wait* v. *Baker* (1848), 2 Ex. 1; *Van Casteel* v. *Booker* (1848), 2 Ex. 691; *Jenkyns* v. *Brown* (1849), 14 Q. B. 496; *Turner* v. *Trustees of Liverpool Docks* (1851), 6 Ex. 543; *Moakes* v. *Nicolson* (1865), 19 C. B., N. S. 290; *Fulke* v. *Fletcher* (1865), 18 C. B., N. S. 403; *Shepherd* v. *Harrison* (1871), L. R. 5 H. L. 116; *Ogg* v. *Shuter* (1875), L. R. 1 C. P. D. 47; *Gabarron* v. *Kreeft* (1875), L. R. 10 Ex. 274.

(*g*) *Joyce* v. *Swann* (1864), 17 C. B., N. S. 84.

(*h*) *Shepherd* v. *Harrison* (1871), L. R. 5 H. L. 116. See also *Barrow* v. *Coles* (1811), 3 Camp. 92.

(*i*) *Ex parte Banner* (1876), 2 Ch. D. 278.

(*k*) *Joyce* v. *Swann* (1864), 17 C. B., N. S. 84.

lading, and took a bill of lading, deliverable to V. or order. The ship arrived on Jan. 26. W., the agent of V., presented on Jan. 27 the bill of lading to P., who refused to accept the bill of exchange annexed, on the plea of short shipment. There was in fact no short shipment; and on Feb. 2, W. sold the potatoes; P. on the same day giving notice that he claimed them, but not tendering the price. *Held*, that until P. paid or tendered cash against the bill of lading, the possession, (*quære* property), was in W., with a power to sell the goods (*l*).

Case 5.—V. purchased cotton by P.'s orders and shipped it on P.'s ship, V. taking a bill of lading, making the cotton deliverable at Z., "to order or assigns, paying for freight for the cotton nothing, being owner's property." V., indorsed the bill in full:—"Deliver to the Bank of Z., or order;" drew bills of exchange on P., and discounted them at another bank on the security of an indorsed bill of lading. V. also forwarded to P. an invoice stating that the goods were shipped "by order and for account of P., and to him consigned." P. became bankrupt before the goods arrived; V. paid the bills of exchange, and claimed to stop the goods *in transitu*; the representatives of P. claimed the goods on arrival. *Held*, that by the terms of the bill of lading, V. reserved to himself the *jus disponendi* in the goods, and did not lose it by indorsing the bill to the bank; and that he consequently was entitled to the goods as against P.'s representative (*m*).

Case 6.—V. shipped 600 tons umber upon a ship chartered for P., under a bill of lading, deliverable to V. or assigns. P. insured the umber. V. drew a bill of exchange for the price and forwarded it for discount to the Z. bank, with the bill of lading. P. declined to accept the bill, but afterwards, and before the bank dealt with the cargo, tendered the amount of the bill of exchange, and demanded the bill of lading. The bank refused, and sold the umber. *Held*, that the refusal and sale were wrongful, and that the property passed to P. on his tender made before the bank had realized (*n*).

Case 7.—V. agreed to sell to P. corn for cash or acceptance on handing over bill of lading. V. sent P. the charter of the ship made in V.'s name, in which the corn was loaded, and took a bill of lading, deliverable to G., or assigns. When the cargo reached its destination V. left the invoice and, an unindorsed bill of lading with P., who raised disputes as to the quality of the cargo, but afterwards tendered the price. V. refused to accept it. *Held*, that no property in the corn passed to P., either at shipment, or by the tender of the price (*o*).

Case 8.—V. agreed to sell to P., iron, payment in cash in L., in exchange for bills of lading. V. took a set of three bills of lading, forwarded two duly indorsed to his agents in L., and retained the third himself. On August 3, V.'s agents tendered the two bills to P., who refused to pay cash unless all three were tendered. V.'s agent accordingly procured the third,

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(*l*) *Ogg* v. *Shuter* (1875), L. R. 1 C. P. D. 47.

(*m*) *Turner* v. *Trustees of Liverpool Docks* (1851), 6 Ex. 543.

(*n*) *Mirabita* v. *Imperial Ottoman Bank* (1878), L. R. 3 Ex. 164.

(*o*) *Wait* v. *Baker* (1848), 2 Ex. 1, distinguished in *Mirabita* v. *Ottoman Bank* (1878), L. R. 3 Ex. D. 164, as a case where the vendor kept a hold on the cargo for the purpose of securing his absolute property in the corn till he chose to pass it to the purchaser, and not merely to secure the contract price. Such a distinction has rather a slender foundation in fact, and it is submitted that the authority of *Wait* v. *Baker* is much weakened by the more recent decision. See also *Ellershaw* v. *Magniac* (1843), 6 Ex. 570; *Gabarron* v. *Kreeft* (1875), L. R. 10 Ex. 274.

and tendered the three to P. on August 9. P. refused to pay cash on the ground that the tender was so late, that he could not forward them so as to reach the port of destination before the ship. *Held* (1), that the tender of what was in fact a bill effectual to pass the property was good, though the purchaser in the absence of the other bills of the set did not know it was effectual (*p*). (2.) *Semble* (*q*), that so long as V. used reasonable diligence in tendering the bill of lading to P., it was not necessary that he should tender it in time for it to reach the port of destination before the carrying ship (*r*).

Article 63.—*Stoppage in transitu.*

Under certain conditions a vendor, who has forwarded goods in such a manner that the property, though not the actual possession, has passed to the purchaser (*s*), has the right of resuming possession of the goods during their transit to the purchaser.

This resumption of possession by the vendor does not amount to a rescission of the contract (*t*), but is the exercise by an unpaid vendor (*u*) of his right to insist on his lien for the price (*x*).

This right, known as the right of Stoppage *in transitu* (*y*), may be exercised by:—

(*p*) Thus if the third bill had been indorsed to I. before the tender of the other two to P., the tender would not be effective, but P. was not entitled to require proof of the effectiveness of the tender, a state of things productive of some hardship.

(*q*) *Per* Brett, M.R., at pp. 336–338: Cotton, L.J., at p. 340, and Bowen, L.J., at p. 344, express themselves not unfavourably to this view, but decline to finally decide it.

(*r*) *Sanders* v. *Maclean* (1883), (C. A.), L. R. 11 Q. B. D. 327.

(*s*) It is beyond the scope of this work to discuss exhaustively the cases when property passes on shipment; the method of reserving property in the vendor by taking bills of lading, making the goods deliverable to his order, has been dealt with above: Article 61. On the question of appropriation of goods not specific, the reader is referred to Benjamin on Sale, Book II., c. 5, and the numerous cases cited in the various stages of *Inglis* v. *Stock* (1885), L. R. 10 App. C. 263.

(*t*) *Kemp* v. *Falk* (1882), L. R. 7 App. C. at p. 581; *In re Humberston* (1846), De Gex, 262; *Wentworth* v. *Outhwaite* (1842), 10 M. & W. 436.

(*u*) It depends on the character of unpaid vendor, and not on the nature of a lien; for other persons who are entitled to liens, have yet no right to stop *in transitu* after they have lost possession. *Kinloch* v. *Craig* (1790), 3 T. R. 783.

(*x*) Statement of law by Cotton, L.J., in *Phelps* v. *Comber* (1885), 29 Ch. D. at p. 821. The right is not affected by the *Bills of Sale Acts: Ex parte Watson* (1877), 5 Ch. D. 35, at p. 44.

(*y*) The history of the right is to be found in Lord Abinger's judgment in *Gibson* v. *Carruthers* (1841), 8 M. & W. 337. It first appears in Chancery in 1690 (*Wiseman* v. *Vandeputt*, 2 Vern. 202), and is introduced into the Courts of Law by Lord Mansfield in 1757 (*Burghall* v. *Howard*), 1 H. Bl. 366, n. See also Benjamin on Sale, 3rd. ed. p. 817; Blackburn on Sale, 2nd ed., by Graham, pp. 310–320.

I. An unpaid vendor of goods, and others in an analogous position; (Article 64):

II. On the bankruptcy or insolvency of the vendee; (Article 65):

III. As against such vendee, and all persons claiming under him; (Article 66):

IV. Except as against an indorsee $\frac{\text{and}}{\text{or}}$ transferee of the bill of lading or other document of title for such goods (*z*), who has given valuable consideration for such indorsement $\frac{\text{and}}{\text{or}}$ transfer, in ignorance of any circumstances which would prevent such indorsement or transfer from acting as a valid transfer of a property or interest in the goods; (Article 67):

V. At any time before the vendee has acquired possession of the goods by himself or his agent, and so terminated the transit (*a*) (Articles 68, 69).

Article 64.—*Who may exercise the right of Stoppage.*

A. An unpaid vendor from whom the property in the goods has passed.

The fact that he has received part of the price will not divest his right (*b*), unless the contract is apportionable, in which case the price also can be apportioned, and part of the goods, being paid for, will be exempt from stoppage (*c*). Neither will the fact that payment has been received in bills of exchange, not yet matured, divest his right (*d*), unless such bills were taken as absolute payment, and not as payment conditional on their being met at maturity, and the burden of proving this is on those who assert it (*e*).

That there is an unadjusted account current between vendor and vendee will not divest the right (*f*); but if there

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(*z*) See Factors' Act, 1877, 40 & 41 Vict. c. 39, s. 5, Appendix III.; and note p. 129.

(*a*) *Lickbarrow* v. *Mason* (1794), 1 Smith L. C., 8th ed. p. 753.

(*b*) *Hodgson* v. *Loy* (1797), 7 T. R. 440; *Feise* v. *Wray* (1802), 3 East. 93.

(*c*) *Merchant Banking Co.* v. *Phœnix Bessemer Co.* (1877), L. R. 5 Ch. D. 205.

(*d*) *Feise* v. *Wray*, *vide supra*; *Edwards* v. *Brewer* (1837), 2 M. & W. 375; *Gunn* v. *Bolckow Vaughan* (1875), L. R. 10 Ch. at p. 501, *per* Mellish, L.J. *Davis* v. *Reynolds* (1815), 1 Stark. 115, must be taken as overruled.

(*e*) Benjamin on Sale, 3rd ed. pp. 714, 715, and cases there cited.

(*f*) *Wood* v. *Jones* (1825), 7 D. & R. 126.

is an ascertained balance against the vendor, it seems that the right is lost (*g*).

B. Persons in a position analogous to that of an unpaid vendor :—

1. A commission agent purchasing goods on orders from his principal is treated for this purpose (*h*) as a vendor, and may stop *in transitu* (*i*).

2. A principal consigning goods to a factor (*k*).

3. The agent of the vendor, to whom a bill of lading has been indorsed, may stop in his own name (*l*), while, without such indorsement, he may stop, if so instructed, in the vendor's name (*m*).

4. The unpaid vendor of an interest in an executory agreement (*n*).

5. A surety for the buyer, who has paid the vendor (*o*).

6. A person who has at the time no authority to stop, provided that the vendor ratifies his action before the transit is ended (*p*).

7. Partner against partner (*q*).

Article 65.—*Insolvency of Vendee.*

Insolvency is the inability to pay just debts in the ordinary course of trade and business (*r*).

(*g*) *Vertue* v. *Jewell* (1814), 4 Camp. 31. This case is perhaps open to some of the criticisms in Benjamin (p. 823), though the remarks founded on *Patten* v. *Thompson* (1816), 5 M. & S. 350, seem erroneous, as that case did not involve the definition of an unpaid vendor, but the question whether a particular indorsement of the bill of lading by the vendee was sufficient to divest the right of stoppage *in transitu*.

(*h*) Though for other purposes as an agent: *Cassaboglou* v. *Gibbs* (1882), L. R. 9 Q. B. D. 220.

(*i*) *Feise* v. *Wray, vide supra; Ireland* v. *Livingstone* (1872), L. R. 5 H. L. at p. 409, *per* Lord Blackburn; *Ex parte Banner* (1876), L. R. 2 Ch. D. at p. 287.

(*k*) *Kinloch* v. *Craig* (1790), 3 T. R. 783; *Newsom* v. *Thornton* (1805), 6 East, 17.

(*l*) *Morison* v. *Gray* (1824), 2 Bing. 260.

(*m*) *Whitehead* v. *Anderson* (1842), 9 M. & W. 518.

(*n*) *Jenkyns* v. *Usborne* (1844), 7 M. & G. 678.

(*o*) Under 19 & 20 Vict. c. 97, s. 5. See also *Imperial Bank* v. *London and St. Katharine Docks* (1877), L. R. 5 Ch. D. 195.

(*p*) *Bird* v. *Brown* (1850), 4 Ex. 786; *Hutchings* v. *Nunes* (1863), 1 Moore, P. C., N. S. 243.

(*q*) *Ex parte Cooper* (1879), 11 Ch. D. 68.

(*r*) *Per* Willes, J., *R.* v. *Sadlers' Co.* (1863), 10 H. L. C. at p. 425.

It may be evidenced by stoppage of payment, or even by failure to pay one debt. It will be sufficient if the vendee is insolvent when the transit ends, though he was not insolvent when the notice to stop *in transitu* was given (*s*).

Quære, whether, if the vendee fails to meet the bills of exchange drawn against the cargo, which fall due after the termination of the transit, but has not up to the end of the transit committed any open act of insolvency, a stoppage *in transitu* by the vendor would be effective (*t*).

Article 66.—*Against whom the right may be exercised.*

The right of stoppage *in transitu* exists against the vendee, and all persons claiming under him, (with the exception stated in Article 67). Thus it avails against a sub-purchaser from the vendee, whose title is not founded on indorsement and delivery of the bill of lading, or of some other document of title, for value, even though he has paid the purchase-money to the vendee. For such a sub-sale would only pass to the sub-vendee such equitable interest as his immediate purchaser could convey and not the legal property in the goods, and would not prejudice the unpaid vendor's right of stoppage *in transitu*, which is a right against the goods (*u*).

(*s*) *The Constantia* (1807), 6 Rob. Adm. Rep. at pp. 326, 327; *Vertue* v. *Jewell* (1814), 4 Camp. 31; *Dixon* v. *Yates* (1833), 5 B. & Ad. 313.

(*t*) Probably not, on the authorities, though it is submitted that on principle the question would be whether the vendee was in fact insolvent on the day of the assignment, or end of the transit. In favour of this latter view, see Sir W. Scott, in *The Constantia* (1807), 6 Rob. Adm. Rep. at pp. 326, 327, and Dr. Lushington, in *The Tigress* (1863), B. & L. 38, at p. 44. On the other side, see Lord Blackburn in *Kemp* v. *Falk* (1882), L. R. 7 App. C. at p. 581, and in Blackburn on Sale (1845), p. 266; and Mellish, L.J., in *Gunn* v. *Bolckow Vaughan* (1875), L. R. 10 Ch. at p. 501.

It seems hard that an indorsee of a bill of lading from a vendee, who knew that his indorser, though he had not committed any open act of insolvency, was in fact unable to pay his debts, should be held to have acquired any title against the unpaid vendor, though some of the above *dicta* suggest that he would acquire such a title.

(*u*) *Kemp* v. *Falk* (1882), L. R. 7 App. C. 573. Being such a right, the unpaid vendor has no rights against the money receivable under a policy of insurance for damage to goods *in transitu*: *Berndtson* v. *Strang* (1868), L. R. 3 Ch. 588.

Where, however, a sub-sale has taken place without indorsement and delivery of a document of title, but the sub-vendee has not paid the purchase-money, the Court in working out the equitable rights of the parties may direct the sub-purchaser to pay the purchase-money to the original vendor as a condition of receiving the goods (*x*).

But if the legal property in the goods has passed out of the vendee, either by an effective indorsement and delivery of a document of title, or by his obtaining and giving actual possession, the vendor will then have no rights against the purchase-money unpaid by the sub-vendee (*x*).

The unpaid vendor's lien will not override the lien of the carrier for his charges on the special goods carried (*y*), but will be preferred to claims on the goods put forward through the vendee alone (*z*); *e. g.*, to a carrier's claim of lien for a general balance due from the owner or consignee of the goods (*y*); or to any attachment of the goods obtained by a creditor of the vendee (*a*).

Case 1.—V. sold goods to P., so that the property passed to P., and they were shipped, consigned to G. P. endorsed the bills of lading to a bank, as security for an advance; G. sold the goods "to arrive" to K. P. then became bankrupt, and V. gave notice to the master to stop the goods *in transitu*. K. paid the purchase money to G., but it had not reached P. The goods were delivered to K. by the master on the production of receipts for the price signed by G. G. paid the purchase money to the bank, who after satisfying their own claims (*b*), paid the balance to P.'s assignees. *Held*, that as the transactions with K., not being accompanied by the transfer of any document of title, had only passed such equitable interest as P. could convey, and not the legal property in the goods, V.'s right of stoppage *in transitu* still existed against the goods, and that, therefore, V., and not P.'s assignees, was entitled to the balance of the purchase money paid by K., after satisfying the bank, V. being in strictness entitled to detain the goods themselves against K. after satisfying the bank (*c*).

Case 2.—V. sold goods to P., to be shipped *f. o. b.* at X. P. resold them

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(*x*) *Kemp* v. *Falk* (1882), L. R. 7 App. C. 573, *per* Lord Selborne at pp. 577, 578; Lord Blackburn, p. 582. See, however, Lord Fitzgerald's reservation, p. 590; *Ex parte Golding, Davis & Co.* (1880), L. R. 13 Ch. D. 628.

(*y*) *Oppenheim* v. *Russell* (1802), 3 B. & P. 42; *Richardson* v. *Goss* (1802), 3 B. &. P. 119. See also *Crawshay* v. *Edes* (1823), 2 D. & R. 288; *Mercantile Bank* v. *Gladstone* (1868), L. R. 3 Ex. 233.

(*z*) *i. e.* Such claims as arise not from the carriage of the goods, but from the fact that the vendee is their owner.

(*a*) *Smith* v. *Goss* (1808), 1 Camp. 282.

(*b*) On the authority of *In re Westzinthus* (1833), 5 B. & Ad. 817, *et post*, Article 67.

(*c*) *Kemp* v. *Falk* (1882), L. R. 7 App. C. 573.

to G., and took bills of lading, making the goods deliverable to G., but did not forward the bills to G. While the goods were on board ship at X., P. stopped payment. V. served notice on the master, stopping the goods *in transitu*. G. had not then paid the sub-purchase money to P. *Held*, that V. was entitled to be paid his purchase money out of the sums owing to P. by G. (*d*).

Article 67.—Effect of indorsement and delivery of a Document of Title on the right of Stoppage.

Such an indorsement of the bill of lading, *bonâ fide* and for valuable consideration, as absolutely passes the property in the goods (*e*), completely defeats the vendor's right of stoppage *in transitu* (*f*).

Such an indorsement as acts as a mortgage or pledge of the goods (*e*), leaves to the vendor the right to stop all the property remaining in the vendee. This is a qualified right, because it cannot be exercised so as to effect the interests of such an indorsee of the bill of lading, without paying him off. The vendor can stop the goods on satisfying the claims of the mortgagee or pledgee; or is entitled to receive the proceeds of the goods after those claims have been satisfied by realization of the goods. He can also in Equity compel the vendee's creditor to marshal the securities for his

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(*d*) *Ex parte Golding Davis & Co.* (1880), L. R. 13 Ch. D. 628. It is submitted that this case must be thus limited if it is to stand with the decision in *Kemp* v. *Falk*, *vide supra*, and the *dicta* therein of Lords Selborne and Blackburn. But James and Cotton, L.JJ., in this case, and the Court of Appeal in *Ex parte Falk* (1880), 14 Ch. D. 446, express themselves in a manner which covers a much wider proposition; *viz.* that where the absolute property has passed by a sale by the vendee to a sub-purchaser, but the sub-purchase money has not been paid, the vendor can stop the sub-purchase money, though the property in the goods is not in the vendee. The dicta in *Kemp* v. *Falk* of Lord Blackburn (p. 582), and Lord Selborne (pp. 577, 578), clearly, though not expressly, negative this proposition. The Court of Appeal in *Ex parte Falk*, recognised the advance apparently made in *Ex parte Golding Davis*, Bramwell, L.J., saying, "the decision was a novelty," but it is submitted that the novelty was only in the *obiter dicta*, and that they cannot be sustained in face of the *dicta* of the Law Lords in *Kemp* v. *Falk*.

(*e*) See *Sewell* v. *Burdick* (1884), 10 App. C. 74, and Articles 57, 58, 72, 73. For cases where no property passed by the indorsement and the unpaid vendor's right was not defeated; see *Patten* v. *Thompson* (1816), 5 M. & S. 350, on which see the Factors' Act of 1842 (5 & 6 Vict. c. 39); *The Tigress* (1863), B. & L. 38.

(*f*) *Lickbarrow* v. *Mason* (1794), 1 Smith L. C., 8th ed. p. 753; *Pease* v. *Gloahec* (1866), L. R. 1 P. C. 219; *Kemp* v. *Canavan* (1863), Irish Rep. 15 C. L. 216, in which the effect of the Bills of Lading Act on *Lickbarrow* v. *Mason* was considered.

debt, so as if possible to protect his rights as unpaid vendor (*g*).

The valuable consideration for which the indorsement is made may be past, (such as a loan already made, or an existing debt,) or present (*h*). The transaction must also be *bonâ fide*, or without knowledge of facts that would make the bill of lading not fairly and honestly assignable, such as an open act of insolvency of the consignee or vendee (*i*), or equities affecting the goods (*k*). That the indorsee knows that the goods have not been paid for is not sufficient to prevent the indorsement from defeating the right to stop (*l*).

Note.—I have not dealt with the difficult questions arising under the Factors' Acts, partly because the most important of them appear not to concern the shipowner or charterer in any way, and partly because proposals for their amendment and codification, promoted by the London Chamber of Commerce, are now (1886) under consideration. Clause 5 of the Factors' Act of 1877 (40 & 41 Vict. c. 39), is specially difficult to construe. It provides that where any document of title to goods (which, I suppose, means a "document of title," as defined in s. 4 of the Act of 1842, (5 & 6 Vict. c. 39), and therefore includes delivery orders and dock warrants), has been lawfully indorsed or otherwise transferred to any person as a vendee or owner of such goods, and such person transfers such document by indorsement or delivery, to a person who takes the same *bonâ fide* and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu*, as the transfer of a bill of lading has.

Apparently, therefore, where B., a vendee to whom the property in goods *in transitu* has passed, sells them to C., and gives

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(*g*) *Kemp* v. *Falk* (1882), L. R. 7 App. C. 573; *Spalding* v. *Ruding* (1843), 6 Beav. 376, 15 L. J. Ch. 374 on appeal; *In re Westzinthus* (1833), 5 B. & Ad. 817. See Articles 72, 73.

(*h*) *Leask* v. *Scott* (1877), L. R. 2 Q. B. D. 376 (C.A.), dissenting from *Rodger* v. *Comptoir d'Escompte de Paris* (1869), L. R. 2 P. C. 393, which held that a past consideration was not sufficient. See also *Chartered Bank* v. *Henderson* (1874), 5 L. R. P. C. 501, where the consideration was forbearance to sue for an existing debt; *The Emilien Marie* (1875), 44 L. J. Adm. 9.

(*i*) *Vertue* v. *Jewell* (1814), 4 Camp. 31; *Cumings* v. *Brown* (1807), 9 East, 506; 1 Camp. 104; *Salomon* v. *Nissen* (1788); 2 T. R. 674, 681. And see Article 65, and note (*t*) p. 126.

(*k*) Such as it was attempted to prove in *Henderson* v. *Comptoir d'Escompte* (1873), L. R. 5 P. C. 253; *Chartered Bank* v. *Henderson*; *The Emilien Marie*, *vide supra*.

(*l*) *Cumings* v. *Brown*, *vide supra*. As to the effect of dealings with the goods otherwise than by indorsement and transfer of the bill of lading, see *ante*, Article 59, note 2; Article 66.

him a delivery order, and C. in turn transfers such delivery order to D. for valuable consideration, the transfer from C. to D. will defeat the right of stoppage in A., the unpaid vendor.

But:—(1), apart from the Factors' Acts, a delivery order unaccepted by the dock company or warehouseman has never been taken by the Courts of law as a document of title at all, but only as "the token of an authority to receive possession": *Farina* v. *Home* (*m*); *M'Ewan* v. *Smith* (*n*); *Griffiths* v. *Perry* (*o*); —(2), though early in the century mercantile juries seem to have considered delivery orders as documents of title, (see Benjamin on Sales, 3rd ed., pp. 804, 805), it is believed that at the present day delivery orders are not treated by London merchants and bankers as "documents of title" at all;—(3), before the Act of 1877 the holder of a delivery order could either (a) present it, and obtain the goods, if there was no stop; (b) present it, and on its being recognized, leave the goods in the hands of the warehouseman as his bailee, constructive delivery thus taking place; (c), could in addition obtain a "warrant" from the warehouseman, as a document of title to the goods; but until he did one of these things, he acquired no title to the goods: see *Imperial Bank* v. *St. Katharine's Docks* (*p*); *Lackington* v. *Atherton* (*q*); and it was expressly laid down in *Barber* v. *Meyerstein* (*r*), that until one of these three courses had been taken, the bill of lading was the only symbol of the goods that could transfer any property in them, but when one of these courses was taken the power of the bill of lading was gone: see also *Coventry* v. *Gladstone* (*s*). But the adoption of any one of these three courses would also terminate the transit, as the warehouseman would then hold as bailee for the vendee or assignee; consequently, apart from the Factors' Acts, a delivery order could have no effect as a document of title until the transit was determined, and therefore dealings with it could have no effect on the vendor's right of stoppage *in transitu*.

Has, then, clause 5 of the Act of 1877 modified this? Taken literally, it certainly has, but it is difficult to believe that the legislature meant to interfere with the position of the bill of lading as the only symbol of the goods while in transit. For the above reasons, the question, which is a difficult one, is only suggested here.

Lord Blackburn, in *Kemp* v. *Falk* (*t*), held that cash receipts *i.e.*, receipts for the price of goods given by the vendee's agents, on production of which the carrier delivered the goods, were not documents of title within clause 5 of the Act of 1877, whose indorsement defeated the vendor's right to stop; and that if

(*m*) (1846), 16 M. & W. 119.
(*n*) (1849), 2 H. L. C. 309.
(*o*) (1859), 1 E. & E. 680.
(*p*) (1877), L. R. 5 Ch. D. 195.
(*q*) (1844), 7 M. & G. 360.
(*r*) (1870) L. R. 4 H. L. at p. 330.
(*s*) (1868) 6 L. R. Eq. 44.
(*t*) (1882) L. R. 7 App. C. at pp. 585, 586.

they were documents of title, the statute was "never meant to have that effect"; what effect is not very clear.

On the general question of delivery orders and warrants, see also *Merchant Banking Co.* v. *Phœnix Bessemer Co.* (*u*); *Gunn* v. *Bolckow Vaughan* (*x*); *Coventry* v. *Gladstone* (*y*); *Pooley* v. *Great Eastern Railway* (*z*).

Article 68.—*The Transit.*

The determination of the beginning or end of the transit during which the goods may be stopped, involving, as it does, questions whether property or possession was intended by the parties to pass, must depend on the intention of the parties as shown by all the facts of the case (*a*).

Thus wrongful or mistaken delivery will not either commence (*b*) or end (*c*) the transit, nor will wrongful refusal to deliver by the carrier prevent the transit being considered at an end (*d*).

The transit commences when the vendor has given up possession of the goods in fulfilment of the contract, and continues until the goods have reached the hands of the vendee, or of one who is his agent to take possession of and keep the goods for him at such a place that the goods will remain there until a fresh destination is communicated to them by orders from the vendee (*e*).

(*u*) (1877) L. R. 5 Ch. 205.
(*x*) 1875) L. R. 10 Ch. 491.
(*y*) (1868) 6 L. R. Eq. 44.
(*z*) (1876) 34 L. T. 537.
(*a*) (1877) Per Jessel, M.R., L. R. 5 Ch. D. 219.
(*b*) *Ruck* v. *Hatfield* (1822) 5 B. & Ald. 632, where goods were shipped conditionally on obtaining bills of lading reserving the *jus disponendi* to the consignor: see also the suggestion in *Schotsman* v. *L. and Y. R. Co.* (1867), L. R. 2 Ch. 332, 335, that a vendor would not terminate the transit by shipping goods on a ship in ignorance of the ship's being owned by the vendee.
(*c*) *Litt* v. *Cowley* (1816), 7 Taunt. 169, where the carrier, after notice to stop, delivered by mistake to the consignee: see also *Loeschman* v. *Williams* (1815), 4 Camp. 181, a case of conditional delivery.
(*d*) *Bird* v. *Brown* (1850), 4 Ex. 786; see also *Cowasjee* v. *Thompson* (1845); 5 Moore P. C. 165, at p. 175, where vendors wrongfully retained a mate's receipt for the goods.
(*e*) *Per* Willes, J., in *Bolton* v. *L. and Y. R.* (1866), L. R. 1 C. P. at p. 439, Lord Ellenborough in *Dixon* v. *Baldwen* (1804), 5 East, 175; approved by C. A. in *Ex parte Miles* (1885), L. R. 15 Q. B. D. 39, at p. 44. See also *Kendall* v. *Marshall* (1883), 11 Q. B. D. 356, and Article 69.

The necessity for stoppage *in transitu* does not arise until the vendor loses possession, as till then his possession enables him to exercise directly his lien for the unpaid price.

In some cases the vendor, by giving up possession, may also end the transit, as where he delivers goods on board the vendee's ship (*f*), without reserving the *jus disponendi* to himself (*g*). It makes no difference whether the ship is a general ship, or sent specially for the goods (*h*), or whether she is owned by the vendee, or is under a charter to him amounting to a demise (*i*).

But delivery of the goods on board a ship chartered by the vendee, if the charter does not amount to a demise, will not end the transit, unless it clearly appears that such is the intention of the parties (*j*). Such an intention will not be inferred from the fact that the delivery is *f. o. b.*, nor from the fact that the vendor does not know the ultimate destination of the vessel (*k*).

Case 1.—V. sold goods to P. and shipped them on board P.'s ship, then on the berth as a general ship. Bills of lading were taken, making the goods deliverable to P. or assigns. *Held*, that such shipment prevented V. from stopping *in transitu* (*l*).

Case 2.—V. sold clay to P. deliverable *f. o. b.* at X. It was shipped at X. on a ship chartered by P. V. did not know the ship's destination: no bills of lading were taken, nor did P. give an acceptance for the price. *Held*, that the clay was in the possession of the master of the ship as carrier, and that V. could therefore stop it during the voyage, on P.'s insolvency (*k*).

(*f*) *Schotsmann* v. *L. and Y. R. Co.* (1867), L. R. 2 Ch. 332; *Merchant Shipping Co.* v. *Phœnix Bessemer Co.* (1877), L. R. 5 Ch. D. 205, at p. 219; *Van Casteel* v. *Booker* (1848), 2 Ex. 691

(*g*) *Vide ante*, Article 61.

(*h*) *Schotsmann* v. *L. and Y. R. Co.*, *vide supra*, at pp. 336, 337, distinguishing *Mitchel* v. *Ede* (1840), 11 Ad. & E. 888.

(*i*) *Fowler* v. *M'Taggart* (1801), cited at 1 East, 522.

(*j*) *Berndtson* v. *Strang* (1868), L. R. 4 Eq., 481; 3 Ch. 588; *Moakes* v. *Nicholson* (1865), 19 C. B. N. S. 290; *Bohtlingk* v. *Inglis* (1803), 3 East, 381; *Thompson* v. *Trail* (1826), 2 C. & P. 334; *Inglis* v. *Usherwood* (1801), 1 East, 515, as explained by the same Court in *Bohtlingk* v. *Inglis*, *vide supra*, at p. 398, is not contrary to the text.

(*k*) *Ex parte Rosevear China Clay Co.* (1879), L. R. 11 Ch. D. 560, and see note (*t*), *sub.*

(*l*) *Schotsmann* v. *L. and Y. R. Co.* (1867), L. R. 2 Ch. 332.

Article 69.—*When the Transit ends.*

The transit may be ended:—

I. By delivery to the vendee or his agents.

II. By delivery to a forwarding agent (*m*).

III. By mutual agreement between vendor and carrier (*m*).

1. By actual delivery to the vendee or his agents (*n*), even before the original place of destination (*o*). What circumstances amount to delivery of the goods will depend on the intention of the parties concerned (*p*).

The delivery of part of the goods operates as a constructive delivery of the whole, only in cases where the delivery takes place in the course of delivery of the whole, as where an essential part of a machine packed in parts is delivered to the consignee (*q*), in which case the taking possession of such a part by the buyer would be the acceptance of constructive possession of the whole (*r*). The burden

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(*m*) These two classes are really special kinds of agents for the vendee.

(*n*) Willes, J., in *Bolton* v. *L. & Y. R. Co.* (1866), L. R. 1 C. P. at p. 439: such delivery may be at the vendee's own warehouse, or at a place which he uses as his own, for the deposit of goods, though belonging to another: *Scott* v. *Pettit* (1803), 3 B. & P. 469; *Rowe* v. *Pickford* (1817), 8 Taunt. 83; *per* Parke, B., in *James* v. *Griffin* (1837), 2 M. & W., at p. 633.

(*o*) *L. & N. W. R.* v. *Bartlett* (1861), 7 H. & N. 400. The *dictum* of James, L.J., in *Ex parte Watson* (1877), L. R. 5 Ch. D. 43, that, where the contract is to send goods to a place Z., "if the vendor found out that the goods were going to be diverted from the ship bound to Z. he would be entitled to obtain an injunction to prevent such diversion," is not inconsistent with this, as delivery after notice to stop *in transitu* would not be effectual in any case, while delivery before notice to stop, though short of Z., would be effectual, in spite of any injunction. *Semble*, that if the vendee acquires possession against the carrier's will, such possession is not effectual to deprive the vendor of his rights. (See Blackburn on Sales, 1st ed. p. 259; *Bird* v. *Brown* (1850), 4 Ex. 786, and cases, Article 68, and note to section 3 of this Article. *Per contra*, Parke, B., in *Whitehead* v. *Anderson* (1842), 9 M. & W. 518, at p. 534.)

(*p*) See cases on constructive delivery summarised in Benjamin on Sales, 3rd ed. pp. 105, 785, 847.

(*q*) *Ex parte Cooper* (1870), 11 Ch. D. 68, *per* Cotton, L J., at p. 75.

(*r*) *Ex parte Cooper* (1879), 11 Ch. D. 68, approving Willes, J., at L. R. 1 C. P. 440. Cases where part delivery has been held to give constructive delivery of the whole, are *Tanner* v. *Scovell* (1845), 14 M. & W. 28; *Slubey* v. *Heyward* (1795), 2 H. Bl. 504; *Hammond* v. *Anderson* (1803), 1 B. & P. N. R. 69; *Jones* v. *Jones* (1841), 8 M. & W. 431, which were criticised in *Ex parte Cooper*, *vide supra*, at p. 77, and *Ex parte Falk* (1880), 14 Ch. D. at p. 455 and 7 App. C. 573, 579, 586. See also *Wentworth* v. *Outhwaite* (1842), 10 M. & W. 436; *Whitehead* v. *Anderson* (1842), 9 M. & W. 518; *Dixon* v. *Yates* (1833), 5 B. & Ad. 313, 339.

of proving such constructive delivery is on those who assert it (*s*).

Case.—V. shipped 100 tons of iron castings to P. on a ship chartered by V. under a bill of lading to P. and assigns. On arrival thirty tons had been delivered to P., who had paid part of the freight. V. then stopped *in transitu*. *Held*, the notice was good as to that part of the cargo not delivered (*s*).

2. Delivery of goods to a forwarding agent will or will not end the transit, according as the forwarding agent receives them as agent for the vendee or as carrier. The chief test of his character is whether he receives the instructions necessary for forwarding from the vendee or vendor (*t*).

Thus, if the vendor from the contract of sale, or from instructions from the vendee, can give no further directions as to the destination of the goods, and they will therefore remain with the forwarding agent, unless and until he has received instructions from the vendee, such an agent will receive the goods as agent for the vendee, and on his receiving them the transit will be at an end (*u*).

If, on the other hand, the vendor can and does give such instructions, as where the contract provides for such further transit, the transit will not end on delivery to the forwarding agent, though the particular ship in which the transit is to be made is ordered by the vendee, for in this case the forwarding agent receives the goods as carrier (*x*).

(*s*) *Ex parte Cooper, vide supra*; one reason given by the Court, that constructive delivery would involve the master's abandonment of his lien for the balance of the freight, appears inconsistent with *Allan* v. *Gripper* (1832), 2 C. & J. 218, in which it was *held* that the existence of the carrier's lien was not inconsistent with his holding as the vendee's agent, though the transit was at an end.

(*t*) *Kendall* v. *Marshall* (1883), 11 Q. B. D. 356. See also a note by Mr. A. Cohen, Q.C., in 'Law Quarterly Review,' Oct. 1885. The test may be put otherwise: "Is the transit prescribed by the vendor over? if so the right to stop is gone, though further transit takes place prescribed by the vendee." But *Ex parte Rosevear China Co.* (1879), 11 Ch. D. 560 (Art. 68, Case 2), shews that sometimes the vendor may be unable to "prescribe the transit," and yet retain his right to stop. It is easy to distinguish the facts of this case from others, but hard to see the principle of distinction between them. The test is also subject to this, that if the vendee gets the goods by consent of the carrier before the prescribed transit is over, the right is gone. See this point discussed by Bowen, L.J., in *Kendall* v. *Marshall*, *vide supra*, at p. 369.

(*u*) *Ex parte Miles* (1885), 15 Q. B. D. 39, affirming *Dixon* v. *Baldwen* (1804), 5 East, 175; *Rowe* v. *Pickford* (1817), 8 Taunt. 83; *Ex parte Gibbes* (1875), L. R. 1 Ch. D. 101; *Leeds* v. *Wright* (1803), 3 B. & P. 320.

(*x*) *Ex parte Watson* (1877), 5 Ch. D. 35, as explained in *Ex parte Miles* (1885), 15 Q. B. D. at pp. 46, 47; *Kendall* v. *Marshall* (1883), 11 Q. B. D. 356; *Rodger* v. *Comptoir d'Escompte* (1869), L. R. 2 P. C. 393; *Valpy* v. *Gibson* (1847), 4 C. B. 837; *Nicholls* v. *Le Feuvre* (1835), 2 Bing. N. C. 81; *Coates* v. *Railton*

Case 1.—V. sold goods to P. in London, P. being employed as commission agent by G. in Jamaica. P. ordered the goods of V. "for the mark E. M. Kingston, Jamaica." V. knew from previous dealings that this mark was used by G. P. instructed V. to pack the goods, mark them with the above mark, and forward them to Q. at Southampton for shipment by the *S.* V. forwarded to Q., adding "please forward as directed:" V. sent particulars of mark, &c., of goods, leaving columns for "consignee" and "destination" blank. After this P. wrote to Q. instructing him as to consignee, G., and destination "Kingston, Jamaica." The goods were shipped under bills of lading describing P. as consignor. P. afterwards failed. *Held*, that V.'s right to stop had ceased when the goods reached Q. (*y*).

Case 2.—V. agreed with P. to sell him goods, drawing bills on him for the price, and shipping them to G. at Z. V. packed the goods, and forwarded them to London in bales marked Z., and addressed to the *S.*, a ship named by P., and bound for Z. The railway company advised P. of the arrival of the goods in London, and that "they remained at his order, and were held by the company as warehousemen at his risk," adding "will be sent to the *S.*" They were so sent and shipped. *Held*, that the transit lasted till the arrival of the goods at Z., and V. could therefore stop *in transitu* at any time before such arrival (*z*).

Case 3.—V. sold goods to P., P. saying nothing about their destination. P. resold to K., and arranged with K. that the goods should be forwarded to Z. by steamer from X. P. then directed V. to send the goods to K. at X. V. did so, and the railway company gave K. notice that they held the goods as his warehousemen. *Held*, that V.'s right to stop *in transitu* was at an end (*a*).

3. The transit may be ended by agreement (*b*) between the carrier, wharfinger, or forwarding agent on the one hand, and the consignee on the other, that the former shall hold the goods not as carrier but as vendee's agent (*c*). The fact that the carrier still claims a lien on the goods will not prevent his holding as vendee's agent, so as to bar the vendor's right of stoppage (*d*).

Note.—There must be a mutual understanding; thus, the intention of the carrier alone, not assented to by the consignee, will not suffice (*e*). Nor will the demand of the vendee if not assented to by the carrier (*f*), provided such refusal to deliver

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(1827), 6 B. & C. 422, (doubted by Brett, L.J., 11 Q. B. D. at p. 366); *Smith* v. *Goss* (1808), 1 Camp. 282; *James* v. *Griffin* (1837), 2 M. & W., *per* Parke, B., at p. 633.

(*y*) *Ex parte Miles* (1885), 15 Q. B. D. 39.

(*z*) *Ex parte Watson* (1877), 5 Ch. D. 35.

(*a*) *Kendall* v. *Marshall* (1883), 11 Q. B. D. 356.

(*b*) *James* v. *Griffin*, *vide supra*; *Bolton* v. *L. and Y. Railway* (1866), L. R. 1 C. P. 431; *Ex parte Barrow* (1877), L. R. 6 Ch. D. 783.

(*c*) *James* v. *Griffin* (1837), 2 M. & W. 623; *Ex parte Gouda* (1872), 20 W. R. 981.

(*d*) *Allan* v. *Gripper* (1832), 2 C. & J. 218; *Kemp* v. *Falk* (1882), 7 App. C. at p. 584.

(*e*) *Edwards* v. *Brewer* (1837), 2 M. & W. 375.

(*f*) *Jackson* v. *Nichol* (1839), 5 Bing. N. C. 508; *Coventry* v. *Gladstone* (1868), L. R. 6 Eq. 44.

is not wrongful (*g*). *Quære*, whether the transit could be so ended during the voyage by agreement between carrier and consignee. It could be by actual delivery to the consignee; why not by the agreement of the carrier to hold as the vendee's agent? Yet this would seriously affect the vendor's rights.

Case 1.—V. sold oil to P. and forwarded it by carrier to Z. On its arrival at Z. the carrier gave notice to P., who signed for it in the carrier's books. *Held*, that the transit was over (*h*).

Case 2.—V. sold goods to P., who lived at Z., and forwarded the goods to Z. by steamer. On arriving, the steamer was discharged into B.'s warehouse. B. was agent of the steamer, and usually held such goods at the risk and subject to the orders of the consignee. In this case he had no orders, as P., being bankrupt, had absconded before the arrival of the goods. V. gave P. notice to stop the goods. *Held*, that the transit was not ended by delivery of the goods to B., who could not be P.'s agent without authority from P. (*i*).

Case 3.—V. sold goods to P., and forwarded them by ship. P. pledged the bill of lading to I. and became bankrupt. When the ship reached the Thames, I. paid the freight to the brokers, and obtained an overside order for delivery. On presenting this at the ship, before she began to unload I. was told that he should have the goods as soon as they could be got at. Before unloading began, V. stopped the goods. *Held*, that the transit was not ended by I.'s transactions, and that V. was entitled to stop (*j*).

Article 70.—*Notice to stop, how given.*

Notice to stop *in transitu*, to be effective, must be given either to the person holding the goods (as the captain of the ship or the warehouseman), while the goods are still *in transitu*, or to the shipowner or principal, whose servant has the custody of the goods, in such a time that he can by reasonable diligence forward it to his servant in time to prevent delivery; and it is his duty so to forward it (*k*).

(*g*) *Bird* v. *Brown* (1850), 4 Ex. 786.
(*h*) *Ex parte Gouda* (1872), 20 W. R. 981.
(*i*) *Ex parte Barrow* (1877), 6 Ch. D. 783.
(*j*) *Coventry* v. *Gladstone* (1868), L. R. 6 Eq. 44.
(*k*) *Whitehead* v. *Anderson* (1842), 9 M. & W. at p. 534; *Kemp* v. *Falk* (1882), L. R. 7 App. C. at p. 585; *per* Lord Blackburn, who suggests that his view is at variance with that expressed by Bramwell, L.J., in the Court below; (*Ex parte Falk*, 14 Ch. D., at p. 455), who said "I cannot think that any duty was imposed on the shipowners at L. to stop the goods; it would be monstrous to hold that the telling someone else to stop the goods amounts to a stoppage *in transitu*." The first sentence is contrary to *Whitehead* v. *Anderson* (at p. 534). But the last sentence is clearly right, as notice to the shipowner, not reaching the captain, could not prevent the consignee from obtaining the goods, the vendor's remedy being against the shipowner. *Litt* v. *Cowley* (1816), 7 Taunt. 169. seems to decide further that delivery by an agent, who through mistake or neglect of his principal

Semble, that delivery by mistake after such a notice is received by the person in whose possession the goods are, will be ineffectual to rob the vendor of his remedy against the carrier (*l*).

Article 71.—*Master's duty on receiving Notice.*

It is incumbent on the master to give effect to a claim to stop *in transitu* by delivery of the goods to the vendor, and not merely by abstaining from delivery to the vendee, as soon as he is satisfied that the claim is made by the vendor, unless he is aware of an answer in law to such claim (*m*). He can protect himself by an indemnity from the person to whom he delivers, or in case of a double claim can interplead.

Article 72.—*Indorsement of Bill of Lading as a Mortgage.*

The effect of indorsement of a bill of lading may be to shew an intention to pass, and to pass, the legal estate in the goods to the indorsee as security by way of mortgage for an advance, leaving the indorser an equitable right to redeem them (*n*).

Article 73.—*Indorsement of Bill of Lading as a Pledge.*

The indorsement may have the effect of giving the indorsee an equitable interest as security by way of pledge for

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has not been informed of a notice to stop duly given to the principal, does not prevent the vendor from maintaining trover against the vendee, but as the case proceeds on the view now abandoned, that notice to stop rescinds the contract, this position can hardly now be justified. It seems therefore, that in such cases the remedy is against the carrier only; for the vendor cannot claim the property, which has passed, or his lien, which has been lost, or possession, which has been abandoned. From this point of view see *Short* v. *Simpson* (1866), L. R. 1 C. P. 248, at p. 255. For an ineffectual notice to stop, see *Phelps* v. *Comber* (1885), 29 Ch. D. 813.

(*l*) *Litt* v. *Cowley* (1816), 7 Taunt. 169; *Short* v *Simpson*, *vide supra*.

(*m*) *The Tigress* (1863), 32 L. J. Adm. at pp. 101, 102.

(*n*) *Sewell* v. *Burdick* (1884), L. R. 10 App. C. 74. There seems to be very little if any difference in the practical effect of these two transactions, but only in the method in which substantially the same rights shall be enforced, whether at Equity or Common Law: (*per* Lord Blackburn, 10 App. C. 92). It is doubtful whether any one of the ordinary forms of mercantile dealings with bills of lading amounts to a mortgage.

an advance, accompanied by a power to obtain delivery of the goods when they arrive, and if necessary to realise them for the purpose of the security (*o*).

An indorsement of bills of lading in blank, and their deposit so indorsed by way of security for money advanced (*p*), without more, will be held to be a pledge (*o*).

Note.—It is impossible to state with any confidence what dealings with a bill of lading will amount to a mortgage as distinguished from a pledge. Probably none of the ordinary commercial dealings with bills of lading amount to mortgages, and the difference between mortgages and pledges is immaterial from a commercial point of view, as it lies chiefly in the exact legal remedies for enforcing the security.

Case.—F. shipped goods to Z. on A.'s ship, taking a bill of lading, making the goods deliverable to F. or assigns. F. indorsed the bill in blank, and deposited it with I. as security for an advance. I. never claimed the goods under the bill of lading. *Held*, that the transaction amounted to a pledge of the goods represented by the bill of lading (*o*).

Article 74.—*Ineffectual Indorsements* (*q*).

An indorsement of the bill of lading may pass no property to the indorsee, as:—

(1.) where the indorser has no property to pass (*r*), having, *e.g.*, already indorsed one part of the bill of lading so as to pass the property (*s*);

(2.) or where there is no consideration for the indorsement (*t*);

(3.) or where the circumstances show that no property was intended to pass, as in the case of an indorsement to an agent to enable him to sell, or to stop *in transitu* (*u*);

(*o*) *Sewell* v. *Burdick*, *ante*, note (*n*).

(*p*) It will require the stamp suitable for a pledge, and not for a mortgage: *Harris* v. *Birch*, 9 M. & W. 591 (1842).

(*q*) This article must be read subject to the provisions of the Factors' Acts, which it is beyond the province of this work to deal with.

(*r*) *Finlay* v. *Liverpool SS. Co.* (1870), 23 L. T. 251, at p. 255; *Gurney* v. *Behrend* (1854), 3 E. & B. at p. 634.

(*s*) *Barber* v. *Meyerstein* (1870), L. R. 4 H. L. 317.

(*t*) *Per* Lord Selborne, 10 App. C. 80; *Waring* v. *Cox* (1808), 1 Camp. 369.

(*u*) *Waring* v. *Cox*, *vide supra*; *Patten* v. *Thompson* (1816), 5 M. & S. (350); *Tucker* v. *Humphrey* (1828), 4 Bing. 516.

(4.) or where the indorsee knows of facts which prevent the indorsement from being effective (*v*), as the open insolvency of a consignee who has not paid the price of the goods (*x*).

But where the indorser has the property, even though such property has been obtained by fraud, an indorsement for valuable consideration to a *bonâ fide* indorsee, before the original owner or indorser has obtained a legal rescission of the transfer, will pass the property (*y*).

Case 1.—Goods consigned to P. were in course of transit landed at a sufferance wharf on the Thames, subject to a stop for freight by A., and to a stop for advance by I., a mortgagee on security of a set of three bills of lading. P. obtained from K. a loan, with which he redeemed the bills from I. and indorsed two to K. as security for his advance. P. obtained another advance from M., to whom he indorsed the third bill. With this advance the stop for freight was removed, and M. obtained the goods from the sufferance wharf on production of his indorsed bill. *Held*, that the property in the goods having passed to K. by the first indorsement, the second conferred no property on M., and K. could recover from him the goods or their value (*z*).

Case 2.—V. shipped to P. oilcake, sending the bill of lading to V.'s agent, W., with instructions not to part with it "without first receiving payment." P. gave W. a bill of exchange accepted by K., and promised immediate payment in cash, on which W. delivered to P. the indorsed bill of lading. P. indorsed the bill of lading to I., who took it *bonâ fide* and for value. P. and K. then became bankrupt, without paying W. *Held*, that though P. had obtained the bill of lading by fraud, he could transfer the property in the goods by its indorsement to I., a *bonâ fide* holder for value (*a*).

Article 75.—Effects of Indorsement under the Bills of Lading Act, 1855 (*b*).

Such an indorsement of the bill of lading as passes to the indorsee the property, whether legal or equitable, (*c*), in the

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(*v*) *Dick* v. *Lumsden* (1793), Peake, 189; *Cuming* v. *Brown* (1807), 1 Camp. 104; *Gilbert* v. *Guignon*, (1872), L. R. 8 Ch. 16.

(*x*) *Vide* Article 65.

(*y*) *Pease* v. *Gloahec* (1866), L. R. 1 P.C. 219; *The Argentina* (1867), L. R. 1 Adm. 370.

(*z*) *Barber* v. *Meyerstein* (1870), L. R. 4 H. L. 317.

(*a*) *The Argentina* (1867), L. R. 1 Adm. 370.

(*b*) 18 & 19 Vict. c. 111, s. 1, see Appendix III. Until this Act was passed, the indorsement of a bill of lading would not affect the contract evidenced in it, and the indorsee could not sue or be sued on such contract, though he was the person really interested in the goods, the subject of the contract: *Thompson* v. *Dominy* (1845), 14 M. & W. 403; *Howard* v. *Shepherd* (1850), 9 C. B. 297.

(*c*) *Sewell* v. *Burdick* (1884), 10 App. C. at pp. 85, 95.

goods, also vests in him all the rights and liabilities arising in respect of such goods from the contract evidenced in the bill of lading (*d*).

He may lose such rights and liabilities by such a further indorsement of the bill of lading as divests him of the property (*e*).

An indorsee of a bill of lading as security for an advance, whether the transaction amounts to a pledge (*f*), or, *semble*, to a mortgage (*g*), does not become liable under the contract evidenced in the bill of lading, until he completes his inchoate title by taking possession of the goods under the bill so indorsed (*f*).

Such a vesting of rights and liabilities by indorsement of a bill of lading does not in any way affect the shipowner's right against the original shipper or owner of the goods for the freight (*h*), or the liability of the consignee or indorsee by reason of his being such consignee or indorsee or of his receiving the goods in consequence of such consignment or indorsement, or any right of stoppage *in transitu* (*i*).

Case.—F. shipped goods to Z. on A.'s ship, taking a bill of lading, making the goods deliverable to F. or assigns, freight payable at Z. F. pledged the bills as security for an advance by indorsing them in blank, and depositing them so indorsed with I. F. did not claim the goods at Z., and they were sold by the authorities there to pay custom-house charges.

(*d*) If the indorsee proves that the immediate indorsement to him was for valuable consideration, he need not also prove that the indorsement to his indorser was for value, in the absence of any evidence of fraud or other circumstances invalidating the indorsement: *Dracachi* v. *Anglo-Egyptian Navigation Co.* (1868), L. R. 3 C. P. 190.

(*e*) *Smurthwaite* v. *Wilkins* (1862), 11 C. B., N. S. 842; but see *Corlett* v. *Gordon* (1813), 3 Camp. 472; *Lewis* v. *McKee* (1868), L. R. 4 Ex. 58. Though the indorsee has agreed to resell the property, if the bill of lading is still an effective instrument he will not lose his rights and liabilities under it, till he has reindorsed it so as to pass the property: *The Felix* (1868), 2 L. R. Adm. 273. *Fowler* v. *Knoop* (1879), L. R. 4 Q. B. D. 299.

(*f*) *Sewell* v. *Burdick* (1884), L. R. 10 App. C. 74, *per* Lord Selborne, at pp. 88, 89, explaining *The Freedom* (1871), L. R. 3 P. C. 594; *The Figlia Maggiore* (1868), L. R. 2 Adm. 106. See also *Allen* v. *Coltart* (1883), 11 Q. B. D. 782, at pp. 784, 785.

(*g*) *Per* Lord Blackburn, 10 App. C. at pp. 96, 97.

(*h*) *Fox* v. *Nott* (1861), 6 H. & N. 630, where the bill was indorsed to the shipowner himself: *Short* v. *Simpson* (1866), L. R. 1 C. P. 248.

(*i*) 18 & 19 Vict. c. 111, s. 2. An indorsement of a bill of lading has by this Act no further effect on the right of stoppage than it would have had before the Act.

I. took no steps to obtain the goods. A. sued I. for freight as indorsee of the bill of lading. *Held*, that as I. had taken no steps to complete his title by claiming the goods under the bill of lading, he was not liable on the contract evidenced in it (*k*).

Article 76.—Position of Indorsee.

The lawful holder of a bill of lading, in whom the property in the goods is vested, may by indorsement transfer a right greater than he himself has; for he transfers his position under the contract evidenced in the bill of lading, but does not transfer any other rights or liabilities which may be vested in him against or to the shipowner, charterer, or original shipper, unless the indorsee has notice of such rights and liabilities (*l*).

Case.—C. chartered a ship from A. and shipped goods in it, receiving a bill of lading from the master. C. saw the method of stowage and did not object to it. C. indorsed the bill to I. The goods were damaged by the method of stowage. I. sued A. on the contract in the bill of lading. *Held*, that I. was not affected either by C.'s position under the charter or by C.'s knowledge of the method of stowage (*m*).

Article 77.—Effects of the Indorsement of the Bill of Lading under the Admiralty Jurisdiction Act, 1861 (*n*), *and Parties under that Act.*

In any case where goods are carried into any port in England and Wales in any ship (*o*), and at the time of the

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(*k*) *Sewell* v. *Burdick* (1884), L. R. 10 App. C. 74. See also *Fowler* v. *Knoop* (1879), L. R. 4 Q. B. D. 299.

(*l*) *Rodger* v. *Comptoir de Escompte de Paris* (1869), L. R. 2 P. C. 393. *The Helene* (1865), B. & L. at p. 424; *The Emilien Marie* (1875), 44 L. J. Adm. 9; *Jenkyns* v. *Usborne* (1844), 8 Scott, N. R. 523.

The ordinary case of defeat of stoppage *in transitu* by indorsement to a *bonâ fide* holder falls under this principle.

(*m*) *The Helene*, *vide supra*.

(*n*) 24 Vict. c. 10, s. 6. See Appendix III.

(*o*) The ship carrying must be the ship doing the wrong: thus where damaged goods were transhipped, and the second ship came to England, she was not held liable for the fault of the first ship, and the first ship when afterwards she came to England was held not liable, as not having carried the goods to England: *The Ironsides* (1862), Lush. 458. But the ship may be liable, though she does not carry the goods into port, as in cases of short delivery: *The Danzig* (1863), B. & L. 102. It will be sufficient that the ship shall come into such a port in the

institution of the cause no owner or part-owner (*p*) of the ship is domiciled in England or Wales, claims (*q*) *in rem* can be made against such ship in the Admiralty Court, as follows:—

I. Claims on contract (*r*).

1. Every indorsee of a bill of lading to whom the property in the goods shipped under the bill of lading shall have passed so as to transfer to him the contractual rights and liabilities under the bill of lading, in virtue of the Bills of Lading Act, 1855, may sue for breach of such a contract.

Thus an indorsee to whom the whole property, legal or equitable, has passed, or a mortgagee or pledgee of the bill of lading who has completed his title by taking possession of the goods under the bill of lading, may so sue (*s*); a mortgagee or pledgee who has not so completed his title (*t*), or a bare assignee of the bill of lading (*u*) to whom no property has passed, cannot so sue on the contract.

2. A consignee named in the bill of lading, to whom the

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course of her voyage, though the goods are not to be delivered there: *The Pieve Superiore* (1874), L. R. 5 P. C. 482, at p. 491. See also *The Bahia* (1863), B. & L. 61; *The Patria* (1871), L. R. 3 A. & E. at p. 459. When she has once been in such a port, the jurisdiction of the Admiralty in respect of that voyage vests, and the claim can be enforced against the ship on her entering an English port in any subsequent voyage; but as the claim does not give a maritime lien, such arrest will not avail against any valid charges on the ship, nor against any *bonâ fide* purchaser: *The Pieve Superiore, vide supra.* The damage must be done on the homeward voyage; there will be no claim for damage on the outward voyage to goods delivered abroad: *The Kasan* (1863), B. & L. 1.

(*p*) This will include a charterer, if the charter amounts to a demise, but not otherwise: *The St. Cloud* (1863), B. & L. 4.

(*q*) The claims must arise independently of the Admiralty Jurisdiction Act: *The St. Cloud* (1863), B. & L. at p. 18; *The Figlia Maggiore* (1868), 2 L. R. Adm. at p. 110, approved by *Lord Selborne*, 10 App. C. at p. 88; *e.g.*, if the claim could not have been made against an English owner before the Act, it cannot be made against a foreign owner by virtue of the Act The Admiralty Court cannot consider a set-off for freight claimed by the shipowner: *The Don Francisco* (1862), Lush. 468.

(*r*) The "contract" in the Act refers to the contract in the bill of lading: *The Pieve Superiore* (1874), L. R. 5 P. C. at p. 491.

(*s*) *Figlia Maggiore* (1868), 2 L. R. Adm. 106; *The Freedom* (1871), 3 L. R. P. C. 594, discussed by Lord Selborne in 10 App. C. at pp. 88, 89. Such right to sue in contract continues until the contractual rights have been lost by such a reindorsement as passes the property, though there is an agreement to sell, which may give an interest to the vendee to sue in tort: *The Felix* (1868), 2 L. R. Adm. 273; *The Marathon* (1879), 40 L. T. 163. See Article 75.

(*t*) Because he has not yet acquired contractual rights under the Bills of Lading Act, 1855: *Sewell* v. *Burdick* (1884), L. R. 10 App. C. 74; and therefore has apart from this statute no legal claim against the shipowner. Article 75.

(*u*) *The St. Cloud* (1865), B. & L. 4. Article 74.

property in the goods has passed by such consignment, may also sue on the contract, as he has under the Bills of Lading Act contractual rights under the bill of lading (*x*). A consignee to whom the property in the goods has not passed by such consignment, or a consignee not named in the bill of lading (*y*) may not sue on the contract, unless he takes a title by indorsement of the bill as above (*z*).

II. *In Tort* (*a*).

1. Every indorsee of the bill of lading, to whom a property as against the indorser, though it may not be the whole property, has passed, may so sue in tort. Thus a mortgagee or pledgee, who has not yet completed his title by taking possession of the goods, may sue in tort (*b*). A bare assignee, having no property in the goods, cannot sue in tort (*c*).

2. A consignee to whom the, or any, property in the goods has passed, may sue in tort (*d*). A consignee to whom no property in the goods has passed cannot so sue (*c*).

Note.—The above statement, it is believed, reconciles all the cases, with the exception of *dicta* in *The Nepoter* (*d*), suggesting that the Admiralty Act intended to give every consignee or assignee of a bill of lading a capacity to sue. These *dicta* were unnecessary, as the plaintiffs there being "consignees named in the bill of lading" had contractual rights under the Act of 1855, and also had, as Sir R. Phillimore held, *a*, though not *the*, property in the goods, which would enable them to sue in tort.

The Act of 1861 gives those who have a lawful claim *in personam* against the shipowner, which fails owing to his absence

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(*x*) 18 & 19 Vict. c. 111, s. 1: *The Nepoter* (1869), 2 L. R. Adm. 375, see also *Fowler* v. *Knoop* (1879), 4 Q. B. D. 299: where the consignee named in the bill of lading, who had sold the cargo, but not assigned the bill of lading, was held entitled to sue.

(*y*) Thus in a bill deliverable "to shipper or order," the consignee ordered would be a consignee not named in the bill of lading.

(*z*) See note (*b*), Article 75.

(*a*) "Breach of duty" of the master will include a refusal to deliver to a vendor who has stopped *in transitu*: *The Tigress* (1863), B. & L. 38; and a refusal by the master to give the holder of the bill of lading the particulars necessary to compute his liability for freight and general average contribution: *The Norway* (1864), B. & L. 226; but not a refusal, though improper, to insert certain particulars in his protest: *The Santa Anna* (1863), 32 L. J. Adm. 198.

(*b*) Though he cannot sue on the contract: *Figlia Maggiore* (1868), 2 L. R. Adm. 106; *per* Lord Blackburn, 10 App. C. pp. 94, 95.

(*c*) *St. Cloud* (1863), B. & L. 4, and *per* Lord Blackburn, 10 App. C. p. 94.

(*d*) *The Nepoter* (1869), 2 L. R. Adm. 375.

from the country, an auxiliary remedy *in rem* against the ship, which is present in the country. But, as was held by Dr. Lushington in *The St. Cloud* (*e*), and by Sir R. Phillimore in *The Figlia Maggiore* (*f*), and approved by Lord Selborne in *Sewell* v. *Burdick* (*g*), the claim must arise in law independently of the Act of 1861, which gave a new remedy, not a new primary right. Who then could sue before 1861? Anyone who had a proprietary interest in the goods could sue in tort. A party to the bill of lading or a consignee named in it, or an indorsee who acquired the property in the goods by the indorsement could sue in contract. But those who had no property could sue neither in contract nor in tort. Those who had a property, but not the property under the Act of 1855, could sue in tort but not in contract. A bare assignee had neither property nor contractual rights, and, thus, apart from the Act of 1861, could not sue at all; it is, therefore, submitted that Sir R. Phillimore's *obiter dicta* to the contrary are inaccurate.

To obtain this result it is not necessary to read "assignee" in the Act of 1861 as "assignee to whom the property shall pass," a process which Dr. Lushington was doubtful about in *The St. Cloud* (*e*), and Lord Blackburn condemned in *Sewell* v. *Burdick* (*g*). For "claim by an assignee" means "lawful claim," and a bare assignee before the Act of 1861 could make no lawful claim.

(*e*) *St. Cloud*, *ante*, p. 143, note (*c*).
(*f*) See note (*b*), *ante*, p. 143.
(*g*) (1884) L. R. 10 App. C. 74, at p. 94.

SECTION VI.

Liability of Shipowner for Loss of, or Damage to, Goods carried.

Article 78.—Liability of Shipowner in absence of express Stipulations.

In the absence of express stipulations in the contract of affreightment, all shipowners who are common carriers, (*i.e.* who offer their ships as general ships for the transit of the goods of any shipper), are liable for any damage to such goods in transit, unless caused by the act of God or the Queen's enemies or the vice of the goods themselves (*a*).

Quære, whether a shipowner who is not a common carrier has the same liability as a common carrier (*b*), or is only liable as a bailee for the exercise of due care and diligence (*c*).

All shipowners who contract to carry goods undertake absolutely, in the absence of express provisions negativing such undertaking, that their ship is seaworthy at the beginning of the voyage (*d*), that they will proceed on the voyage with reasonable despatch (*e*) and without unnecessary deviation (*f*).

(*a*) *Nugent* v. *Smith* (1876), L. R. 1 C. P. D. 19, 422; *Liver Alkali Co.* v. *Johnson* (1874), L. R. 9 Ex. 338. See Articles 80, 81.

(*b*) *Per* Brett, M. R., in *Nugent* v. *Smith* (1876), L. R. 1 C. P. D., at p. 33, and *Liver Co.* v. *Johnson* (1874), L. R. 9 Ex., at p. 344.

(*c*) *Per* Cockburn, C.J., in *Nugent* v. *Smith*, *vide supra*, at pp. 434, 438. See also *per* Willes, J., in *Notara* v. *Henderson* (1872), L. R. 7 Q. B., at p. 236; *Grill* v. *General Colliery Co.* (1866), L. R. 1 C. P., at p. 612. If he has the liability of a carrier he will be liable for the negligence of persons other than himself or his agents, such as damage by collision where the other ship is negligent; *Woodley* v. *Michel* (1883), L. R. 11 Q. B. D. 47. If he has only the liability of a bailee he will be free where he can prove that he and his servants have exercised reasonable care and diligence.

(*d*) *Steel* v. *State Line* (1878), L. R. 3 App. C. 72, and Article 29.

(*e*) See Art. 30.

(*f*) See Arts. 99, 100.

Note.—In the law as thus stated there are two disputed points:—

(1.) Whether the owner of a ship or lighter hired to carry a specific cargo on a particular voyage, as distinguished from a general ship plying habitually between particular ports and carrying the goods of all comers, is a common carrier, and therefore liable in the absence of express stipulation for all damage resulting in transit, unless by the act of God or the Queen's enemies or vice in the goods themselves.

(2.) Whether, apart from the liabilities of a common carrier, every shipowner or master who carries goods on board his vessel for hire is, in the absence of express stipulations, subject to the liability of an insurer, except as against the act of God or the Queen's enemies or inherent vice in the goods, or whether he is only liable for loss shown to have arisen from negligence on his part, or on that of his servants.

The practical importance in the case of ships is not very great, as the difference in the law would chiefly affect ships chartered to one shipper without any express stipulations in the charter, an unusual case; but it is important in the case of lighters, which are frequently let out for hire in that way. There is also an important question in connection with bills of lading, as to the shipowner's liability for the negligence of persons other than his servants, *e.g.*, those in charge of a ship in collision with his vessel.

I. The first question has been discussed in *Liver Alkali Co.* v. *Johnson* (1872) (*g*). There, A. was a lighterman and let out his flats to any customer who applied for them; his flats did not ply between any fixed points, but each voyage was fixed by the particular customer; a special bargain was made with each customer, though not for the use of a particular flat; but no flat was carrying goods for more than one person on the same voyage. A. let a flat on these terms to C. to carry salt from L. to W.; on the voyage, without A.'s negligence, the flat was wrecked. C. sued A. for the damage to the salt. The Court, consisting of Kelly, C.B., Martin, Bramwell, and Cleasby, B.B., held A. a common carrier, and therefore liable. Kelly, C.B., laid stress on the fact that no particular vessel was hired, saying: "No doubt, if each particular voyage had been made under a special contract containing stipulations applicable to that voyage only, the case would have been different," which seems to distinguish the case of a ship specifically chartered to a particular shipper.

In the Exchequer Chamber the majority of the Court (Blackburn, Mellor, Archibald, and Grove, JJ.), affirmed this judgment (*h*) "on the ground that a lighterman, carrying on business as described, does in the absence of something to limit his

(*g*) L. R. 7 Ex. 267.
(*h*) (1874), L. R. 9 Ex. 338, at p. 341.

liability *incur the liability of a common carrier* in respect of the goods he carries." Brett, J., while agreeing that A. was liable, put his liability on the ground that (*i*) "by a recognised custom of England every shipowner who carries goods for hire in his ship, whether by inland navigation, or coastways, or abroad, undertakes to carry them at his own absolute risk, the act of God or the Queen's enemies alone excepted," unless he limits this liability by express agreement. He emphatically held that A. was not a common carrier, on the ground that he did not undertake to carry goods for, or charter his flat to, the first comer; (and therefore was not liable to an action for refusing to do so, the essential characteristic of a common carrier). The rest of the Court had expressly abstained (*k*) from examining whether A. was a carrier so as to be liable to such an action, and had confined themselves to deciding that he "had the liability of" (*quære*, the same liability as), a common carrier. In *Nugent* v. *Smith* (*l*), Cockburn, C.J., repeated Brett, J.'s, objection: "I cannot help seeing the difficulty that stands in the way of *Liver Alkali Co.* v. *Johnson*, namely, that it is essential to the character of a common carrier that he is bound to carry the goods of all persons applying to him, while it has never been held, and, as it seems to me, never would be held, that a person who lets out vessels to individual customers on their application was liable to an action for refusing the use of such vessel if required to furnish it."

The judgment however may be supported on narrow grounds: (1.) It only applies, according to the judgment of the Court below, to cases where no specific vessel is chartered or hired, but there is a contract to carry so much goods; the case of a specific charter is expressly excluded. (2.) The Court above do not decide that A. was a common carrier, but only that a lighterman, contracting to carry goods in some vessel or other, has the same liability as a common carrier. The case therefore may be confined to the calling of lightermen; and whether a lighterman has the liabilities of a common carrier is a question of fact in each particular case (*m*). At present the leading lightermen on the Thames expressly decline to take the liability of common carriers, and only hold themselves liable for damage from negligence or wilful acts on the part of their servants (*n*).

II. The custom to insure, binding on all shipowners lending their vessels for hire, rests in modern times on the great authority of Lord Esher, who expressed that opinion in 1874, in the case just cited, and repeated it in 1875, in *Nugent* v. *Smith* (*o*),

(*i*) At p. 344.
(*k*) See p. 340.
(*l*) L. R. 1 C. P. D. at p. 433.
(*m*) *Tamvaco* v. *Timothy* (1882), 1 C. & E. 1.
(*n*) See *Tate* v. *Hyslop* (1885), L. R. 15 Q. B. D. at p. 370.
(*o*) 1 C. P. D. at p. 33.

where he said, Denman, J., concurring: "The true rule is that every shipowner or master who carries goods on board his ship for hire is, in the absence of express stipulation to the contrary, subject by implication . . . by reason of his acceptance of the goods to be carried, to the liability of an insurer, except as against the act of God or the Queen's enemies . . . not because he is a common carrier, but because he carries goods in his ship for hire." As the ship there was a general ship, this was *obiter dictum*, but in the Court of Appeal, Cockburn, C.J., admitting that the point was not involved in the case, took occasion to entirely dissent from the view of Brett, J., in a very elaborate judgment, in which he held that no such liability existed, but that shipowners, other than of general ships, were only bailees, and bound to use ordinary care and diligence.

On this two questions arise (1.) as to the history of the rule; (2.) as to its present position.

I. As to its history, the view of Brett, J., is (*p*) that the common law of England as to bailments is founded on the Roman law, that therefore bailees are liable only for ordinary care, unless they fall within certain classes, who are absolute insurers, the historical origin of these classes being found in the Prætor's Edict (*q*). This historical view has been attacked, I venture to think successfully, by Mr. O. V. Holmes in his work on the Common Law (*r*).

Cockburn, C.J., took the view (*s*) that the strict liability of carriers was introduced by custom in the reigns of Elizabeth and James I. as an exception to the ordinary rule that bailees were bound only to use ordinary care (*t*).

Holmes maintains that the stricter liability is the older of the two, and that the present liability of carriers is therefore a survival of the old rules (*u*).

(*p*) L. R. 1 C. P. D., at p. 29.
(*q*) Dig. IV. 9.
(*r*) (1882) London, pp. 175–205.
(*s*) 1 C. P. D. at p. 430.
(*t*) Liability of innkeepers, *Caley's Case* (1584), 8 Co. 32. Of common carriers by land, *Woodliff's Case* (1596), Moore, 462; Owen, 57. Of common carriers by water, *Rich* v. *Kneeland* (1613), Hob. 17; Cro. Jac. 330. The first case cited for the general liability of shipowners is *Morse* v. *Slue* (1671), 2 Keb. 866; 3 Keb. 72, 112, 135; 2 Lev. 69; 1 Vent. 190, 238; 1 Mod. 85; Sir T. Raym. 220.
(*u*) The fuller discussion of the historical question is beyond the scope of this work. The reader may refer to Holmes, C. L. c. 5, Bailments, and to the following cases: *Southcote* v. *Bennet* (1601), 4 Rep. 83 b., Cro. Eliz. 815 (adversely discussed by Lord Holt in *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909, and Sir W. Jones on Bailments, 3rd ed. pp. 41–45); *Rich* v. *Kneeland* (1613), *vide supra*; *Symons* v. *Darknoll* (1628), Palmer, 523; *Nicholls* v. *Moore* (1661), 1 Sid. 36; *Matthews* v. *Hopkin* (1667), 1 Sid. 244; *Morse* v. *Slue* (1671), *vide supra*; *Goff* v. *Clinkard* (1750), 1 Wils. 282, n.; *Dale* v. *Hall* (1750), 1 Wils. 281; *Barclay* v. *Y. Gana* (1784), 3 Dougl. 389; *Trent Navigation* v. *Ward* (1785), 3 Esp. 127; *Forward* v. *Pittard* (1785), 1 T. R. 27; *Lyon* v. *Mells* (1804), 5 East, 428.
The two English exceptions to the carrier's liability, which are different from

II. As to the rule of law now prevailing, it seems that the view supported by Lord Esher is the safest to adopt at present, as it has been virtually acted upon by the Court of Appeal in the cases of *Woodley* v. *Michell* (*v*) and *The Xantho* (*w*). It is certainly opposed to several *dicta* of Willes, J., *e.g.*, "the shipowner's exemption is from liability for loss which could not have been avoided by reasonable care, skill, and diligence" (*x*). . . . "The contract in a bill of lading is to carry with reasonable care unless prevented by the excepted perils" (*y*); and also to the judgments in *Laurie* v. *Douglas* (*z*) where a direction to the jury that "a shipowner was only bound to take the same care of goods as a person would of his own goods, *i.e.*, an ordinary and reasonable care," was held a proper direction; and in *The Duero* (*a*). But these, again, are inconsistent with the judgments in *Laveroni* v. *Drury* (*b*), and *Kay* v. *Wheeler* (*c*).

Several cases involving the consideration of the nature of the shipowner's contract are now, it is understood, on their way to the House of Lords (*d*), and till they are decided the law cannot be stated with any certainty, but in the absence of any contrary judgment from the House of Lords, the view of Lord Esher appears to be the safest to follow.

Article 79.—Exceptions in the Contract of Affreightment.

Charterparties contain an undertaking by the shipowner and charterer to perform their respective parts of the contract;—bills of lading contain an undertaking by the ship-

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the Roman ones, have each a purely English history. The exception: "the act of God" results from the discharge of contractors from performance rendered impossible by the act of God (Holmes, 202); that of "the King's enemies," from the rule that the bailee had no action against them, they not being amenable to civil process; and that therefore it was not fair that the bailor should sue him. (Holmes, 177, 201; *Marshal of Marshalsea's Case*, Y. B. 33 Hen. 6. 1 pl. 3.)

(*v*) (1883), L. R. 11 Q. B. D. 47.

(*w*) June 9, 1886; not yet reported except in 2 Times L. R. 704.

(*x*) *Notara* v. *Henderson* (1872), L. R. 7 Q. B. at p. 236.

(*y*) *Grill* v. *General Iron Screw Co.* (1866), L. R. 1 C. P. at p. 612.

(*z*) (1846), 15 M. & W. 746.

(*a*) (1869), L. R. 2 A. & E. 393.

(*b*) (1852), 8 Ex. 166.

(*c*) (1867), L. R. 2 C. P. 302.

(*d*) *The Xantho, vide supra*; *Pandorf* v. *Hamilton*, not yet reported, except in 2 Times L. R. 891, in which the C. A., on August 9, 1886, reversed the judgment of Lopes, L.J. reported 16 Q. B. D. 629; *Newall* v. *Royal Exchange Co.*, 33 W. R. 342, 868. There are also waiting for argument in the C. A.: *S.S. Garston* v. *Hickie Borman*, raising the question whether a collision by negligence of the other ship is a "peril of navigation," and *Nottebohm* v. *Richter*, raising a question as to the meaning of "at ship's risk and expense."

owner or carrier to deliver safely the goods set forth in them; unless prevented by certain perils known as "excepted perils" or exceptions. For the consequences resulting solely from the occurrence of these perils, the shipowner or charterer under a charterparty, the shipowner or carrier under a bill of lading, are not liable (*e*).

Note 1.—The original exception in the bill of lading was only "the act of God, the King's enemies, and dangers of the seas." As the result of a case tried in 1795 (*f*), these exceptions were enlarged "to the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted." This clause has been still further extended, until as has been said "there seems to be no other obligation on the shipowner than to receive the freight." The excepted perils vary with each trade and each shipowner; and some great companies have two bills of lading, imposing on them different degrees of liability, according to the rate of freight paid. Exceptions are so numerous that an exhaustive enumeration is impossible; but the following is believed to be a tolerably comprehensive list of exceptions to be found in one or other of the chief bills of lading in use in London or Liverpool.

The act of God (*g*).
The Queen's enemies (*h*).
Pirates (*i*), robbers, thieves, whether on board or not, pilferage (*j*).
Barratry of master and mariners (*k*).
Arrest and restraints of princes, rulers, and peoples (*l*), revolutions, riots, or emeutes, strikes, lockouts, or stoppage of labour from whatever cause.
Loss or damage from vermin, rust, hook-marks, or injury from hooks, sweating, wastage, drainage, leakage (*m*), chafage, breakage, evaporation, rain, spray, coal, or coal-dust, corruption, frost, thaw, inherent deterioration, decay, jettison (*n*).
Insufficiency of strength or size of packages, reasonable wear and tear of packages, inaccuracy, indistinctness, illegibility or obliteration of marks, numbers, brands, or addresses, or description of goods, injury to wrappers however caused;

(*e*) As between shipowner and charterer, the exceptions in the charter are of importance, as between shipowner or charterer, and shipper, the exceptions in the bill of lading. On the relation between exceptions in the charter and bill of lading where the charterer is also the shipper, see *Rodoconachi* v. *Milburn* (1886), 17 Q. B. D. 316; and Article 18 a.

(*f*) *Smith* v. *Shepherd*, McLachlan, 3rd ed. p. 535; Abbott, 12th ed. pp. 258, 328.

(*g*) See Article 80.
(*h*) See Article 81.
(*i*) See Article 85.
(*j*) All these do not occur in the same bill of lading.
(*k*) See Article 88.
(*l*) See Article 82.
(*m*) See Article 86.
(*n*) See Article 90.

injurious effects of other goods (*o*), contact with or smell, or evaporation or taint from other goods, not liable for condition of re-exported goods, ullage (*p*), spiles (*q*), effect of climate, or heat of holds, change of character (*r*), not accountable for slack bags, unless they bear external evidence of having been broken or opened,

or

not liable for leakage, breakage, loss or damage by heat, sweat, rust, or decay, unless occasioned by improper stowage,

or

loss or damage, unless resulting from improper stowage or pilferage, not occurring with the owner's own personal default or privity, excepted; not liable for loss of goods under any circumstances whatsoever (*s*).

Fire (1) (*t*), at any time or in any place; (2), before loading in the ship or after unloading; (3), on board, in hulk or craft, or on shore; heat, spontaneous combustion, burning from heat of machinery.

Perils of boilers, steam, or steam machinery (*u*), including pumps or pipes of any sort, and consequence of defects therein or damages thereto, escape of steam, explosion.

Risk of lighterage to or from the vessel, risk of craft (*x*), or warehousing, risk of storage afloat or on shore, save risk of boats so far as ships are liable (*y*).

Transhipment, delay at port of transhipment, loss from ships not having room at port of transhipment, not liable for restriction of quarantine, interruption to navigation by ice, for any claim for delay, or sea-risks, if goods are carried beyond port of destination, loss or damage caused by prolongation of the voyage, detention caused by mail contracts, delay by sanitary regulations, collision (*z*).

Stranding, straining, other perils of the seas, rivers, steam, and steam navigation, or land transit (*a*) of what order, nature, or kind, heeling over, upsetting, submerging or sinking of ship in harbour, river, or sea, or the entry or admission

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(*o*) See Articles 31, 86.

(*p*) = leakage.

(*q*) = the leakage resulting from holes stopped by a peg called a "spile" bored in a cask for the purpose of getting at its contents, which are sometimes replaced by water. The effect of the exception will be to free the shipowner from liability for leakage and watering, unless the shipper proves negligence of the superior officer.

(*r*) As by over-ripeness and decay of fruit, &c.

(*s*) *Held*, to cover wilful default and misfeasance by shipowners' servants: *Taubman* v. *Pacific S.S. Co.* (1872), 26 L. T. 704.

(*t*) See Article 87: the exception, "fire on board," does not relieve the shipowner from liability to general average contribution for damage done by water in extinguishing such fire: *Schmidt* v. *Royal Mail S.S. Co.* (1876), 45 L. J Q. B. 646.

(*u*) Does not apply if the defect was due to negligence; *Siordet* v. *Hall* (1828), 4 Bing. 607: or if the machinery was unseaworthy at starting, though the defect was latent: *The Glenfruin* (1885), 10 P. D. 103. "Risks of steam navigation," = physical risks, incidental to ships propelled by steam machinery, such as breakdown of engine, disabling of screw, &c.: *Mercantile S.S. Co.* v. *Tyser* (1881), L. R. 7 Q. B. D. 73.

(*x*) = Without risk or liability to the owner of the craft in respect of the carriage of the goods: *Webster* v. *Bond* (1884), 1 C. & E. 338. The meaning of the clause "at ship's risk and expense" is now waiting decision before the C. A. in the case of *Nottebohm* v. *Richter*.

(*y*) Held to protect from liability for any loss occurring to goods in boats, which shipowners would not be liable for, had it occurred in ships: *Johnston* v. *Benson* (1819), 4 Moore, 90.

(*z*) See Article 84.

(*a*) Perils of the roads—*held* to mean "perils peculiar to roads"; whether marine roads or anchorages, or land roads, was not decided: *Rothschild* v. *Royal Mail Co.* (1852), 7 Ex. 734, at p. 743.

of water into the vessel by any cause or for any purpose, loss or damage caused by heavy weather, or pitching or rolling of the vessel:
not liable for negligence of shipowner's servants (*b*),
exceptions of all liability, or limited liability, in respect to particular goods (*c*), as glass, specie, precious stones, cattle, &c.,
not liable for damage, unless goods are marked in a particular way (*d*);
not liable for any damage capable of being covered by insurance (*e*); under through bills of lading, not liable for damage occurring off the company's steamer.
Exceptions expressly negativing the shipowner's warranty of seaworthiness (*f*).
Liberty to tranship, to sail with or without pilots, to call at intermediate ports for any purpose, to deviate from the voyage for any purpose, and to touch and stay at other ports either in or out of the way, to tow and assist vessels in all situations (*g*), and perform salvage services to vessels and cargo, without being deemed a deviation, to proceed under sail, or in tow of any vessel;
not liable to any claim (*h*), notice of which is not given;—before the removal of the goods; or—within two days after:—or within certain limits of time and place;
owners only liable for ship damage, &c. (*i*)
inability of ship to execute or proceed on the voyage (*k*).

Many of these exceptions of course overlap, and they are not all found in the same bill of lading, while some of them are modified in form. Though shipowners use them to protect themselves from legal liability, they frequently make some compensation as a matter of business for losses covered by the exceptions.

Note 2.—The implied undertakings in a contract of affreightment (*l*), *e.g.*, to provide a seaworthy ship, to proceed without unreasonable delay, and without deviation, and the cancelling clause in a charter (*m*), are not affected by exceptions in the bill of lading, unless these latter expressly negative them; thus the breakdown of a crankshaft, unseaworthy at starting, does not come within the exception "breakdown of machinery" (*m*); neither will these exceptions interfere with the operation of express conditions precedent, such as a "cancelling clause" (*n*).

(*b*) See Article 89.

(*c*) *Semble*, that these do not apply, unless the ship is seaworthy at starting: *The Glenfruin* (1885), 10 P. D. 105; *Leuw* v. *Dudgeon* (1867), L. R. 3 C. P. 17, note. *Tattersall* v. *National S.S. Co.* (1884), L. R. 12 Q. B. D. 297.

(*d*) For an example of the working of this exception, see *Cox* v. *Bruce* (1886), 2 Times L. R. 599.

(*e*) This exception does not relieve the shipowner from liability to general average: *Crooks* v. *Allan* (1879), 5 L. R. Q. B. D. 38. It has been held on this exception that "damage" covers total or partial destruction, but not abstraction of goods: *Taylor* v. *Liverpool S.S. Co.* (1874), L. R. 9 Q. B. 546.

(*f*) See Article 29.

(*g*) See *post*, Article 99.

(*h*) Refers to claims for any damage, whether apparent or latent: *Moore* v. *Harris* (1876), 1 App. C. 318.

(*i*) Ship damage=such damage as happens by the insufficiency of the ship, or the negligence of those in charge of her: *East India Co.* v. *Todd* (1788), 1 Bro. P. C. 405.

(*k*) Inability to proceed from lack of men through smallpox, is within the exception: *Beatson* v. *Schank* (1803), 3 East. 233.

(*l*) See Articles 29, 30, 99.

(*m*) *The Glenfruin* (1885), 10 P. D. 103.

(*n*) *Smith* v. *Dart* (1884), L. R. 14 Q. B. D. 105; but see *Donaldson* v. *Little* (1882), 10 Sc. Sess. Cases, 413. As to the effect of exceptions on the implied contract to proceed without deviation, see *Stuart* v. *British African Navigation Co.* (1875), 32 L. T. 257.

Note 3.—The perils which the shipowner in the bill of lading stipulates that he shall not be liable for, are nearly the same as the underwriter insures shipowner and cargo-owner against by his policy of insurance, but a different rule of law is applied to the construction of the two documents (*p*) *e.g.*:—

In policies of insurance only the *causa proxima* of the loss is regarded, so that if the loss has been proximately caused by a peril insured against, the underwriter is liable, even though the ultimate cause of the loss, the *causa causans*, is a peril not insured against.

In bills of lading the ultimate cause or *causa causans* is considered; so that where goods are damaged by the immediate operation of an excepted peril, but such operation was caused or assisted by a peril not excepted, the shipowner will be held liable.

Thus in a bill of lading whose only exception is "perils of the seas," where damage results from a storm, the shipowner will still be liable, if it is proved that the stowage was negligent, and that such negligence co-operated with the storm to damage the goods (*q*). But in a policy of insurance the underwriter would be liable for damage from a storm as a peril of the sea, though it was proved that the ship became unseaworthy on the voyage through negligence of the owner's servants (*r*).

Willes, J., explained this difference thus (*s*): "A policy of insurance is an absolute contract to indemnify for loss by perils of the sea, and it is only necessary to see whether the loss comes within the terms of the contract and is caused by perils of the sea; the fact that the loss is partly caused by things, not distinctly perils of the sea, does not prevent its coming within the contract. In the case of a bill of lading it is different, because there the contract is to carry (*t*) [with reasonable care] unless

(*p*) The *obiter dictum* in *The Freedom*, L. R. 3 P. C. 594, at p. 601 (1871), that perils of the seas in a bill of lading, are to be interpreted as in an insurance policy is clearly wrong: see *per* Willes, J., L. R. 1 C. P. 612; per Brett, M.R., 10 Q. B. D. 531; per Lindley, L.J., 10 Q. B. D. 543; per Lord Blackburn, in *Cory* v. *Burr* (1883), 8 App. C. 398; *The Chasca* (1875), L. R. 4 A. & E., at p. 448.

(*q*) *The Oquendo* (1878), 38 L. T. 151; *The Catherine Chalmers* (1875), 32 L. T. 847.

(*r*) *Walker* v. *Maitland* (1821), 5 B. & A. 171; *Davidson* v. *Burnand* (1879), 4 L. R. C. P. 117; *Redman* v. *Wilson* (1845), 14 M. & W. 476. For further illustration of the difference in principle, consider *Cory* v. *Burr* (1883), 8 App. C. 393; *West India Telegraph Co.* v. *Home Insurance Co.* (1880), 6 Q. B. D. 51; *Taylor* v. *Dunbar* (1869), 4 L. R. C. P. 206, and compare *Woodley* v. *Michel* (1883), 11 Q. B. D. 47, with *Smith* v. *Scott* (1811), 4 Taunt. 126.

(*s*) *Grill* v. *Iron Screw Colliery Co.* (1868), L. R. 1 C. P. at p. 612.

(*t*) *Quære*, whether the words in brackets should not be omitted: see note to Article 78.

prevented by the excepted perils. If the goods are not carried with reasonable care, and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that if the loss through perils of the seas is caused by previous default of the shipowner, he is liable for this breach of his contract."

This explanation hardly meets such cases as *Woodley* v. *Michel* (*t*), where the shipowner has "carried with reasonable care, but the negligence of another ship is the ultimate cause of loss."

At any rate the distinction exists, and the result is curious. A ship carries goods shipped under a bill of lading excepting "perils of the sea," and shipowner and shipper insure ship and goods respectively against "perils of the sea." Both ship and goods are lost, through tempestuous weather, assisted by negligence of the captain. The shipowner will be liable to the shipper for the loss of the goods, because they were not lost through perils of the sea within the meaning of the bill of lading. But the shipowner can recover the value of the ship from the underwriter, because it was lost by perils of the sea within the meaning of the policy of insurance, both ship and goods being lost through the same set of circumstances.

On the relation of the exceptions to the burden of proof, see Article 91.

Note 4.—Exceptions on charterparties stand on different footing from those on bills of lading.

1. The exceptions in the bill of lading only apply to exonerate the shipowner or carrier; exceptions in the charter apply to exonerate both shipowner and charterer, though the shipowner's liability for carriage is usually much restricted by the subsequent bill of lading, where the charterer is also the shipper (*u*).

2. The exceptions in the charter are much more concise than those in a bill of lading;—"The act of God, the Queen's enemies, fire, and all and every dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever during the said voyage always excepted";—being a very usual form.

3. Where the cargo is one in great demand, as in coal charters, there is frequently a further set of exceptions applying to the clauses as to loading, and demurrage, *e.g.*, "any time lost through riots, strike or stoppage of factory or factories or other hands connected with the working or delivery of the said patent fuel or coals, or by reason of accident to the factories or machinery or obstruction in the canal or dock, or from any cause beyond the personal control of shippers, is not to be computed as part of the loading days."

(*t*) (1883), 11 Q. B. D. 47.

(*u*) But on this, see *Rodoconachi* v. *Milburn* (1886), 17 Q. B. D. 316.

Article 80.—*Act of God.*

The exception "act of God" includes any accident as to which the shipowner can show that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight, pains, and care reasonably to be expected from him (*v*).

A stricter view than this was taken by Brett and Denman, JJ., in the Court below (*w*), but negatived by the Court of Appeal, Mellish, L.J., saying: "I think that in order to prove the cause of the loss was irresistible, it is not necessary to prove that it was absolutely impossible for the carrier to prevent it, but that it is sufficient to prove that by no reasonable precaution under the circumstances could it have been prevented." This view is supported by *Nichols* v. *Marsland* (*x*), in which the jury found that a flood was "so great that it could not reasonably have been anticipated, though if it had been anticipated the effect might have been prevented," and the Court of Appeal held that such a flood was an "act of God."

The exception "act of God" appears to include the exception "perils of the sea," and in addition to cover such causes of loss, as frost, lightning, &c., which are not perils peculiar to the sea (*y*).

Case 1.—A., a common carrier between L. and A., took on board a mare of F.'s. No bill of lading was signed. Partly by more than ordinary bad weather, partly by the conduct of the mare, without any negligence by A.'s servants, the mare was seriously injured. *Held*, that A. was not liable for injuries resulting from these causes, which he could not by reasonable care and foresight have prevented, and which therefore came under the exception to a carrier's liability, of damage resulting from the act of God (*z*).

Case 2.—Goods were shipped under a bill of lading excepting the "act of God." The vessel having to start the next morning, the captain filled his boiler overnight, and, frost coming on, the tubes burst damaging the goods. *Held*, that the negligence of the captain excluded the exception, though frost was an "act of God" (*a*).

(*v*) Per James, L.J., in *Nugent* v. *Smith* (1876), L. R. 1 C. P. D. at p. 444; see also Cockburn, C.J., at pp. 437, 438, Mellish, L.J., at p. 441.

(*w*) 1 C. P. D. at p. 34.

(*x*) (1876) L. R. 2 Ex. D. 1.

(*y*) See Article 83, *post*. As to the history of the phrase "Act of God," see O. W. Holmes' Common Law, p. 202, *et ante*, Article 78, note (*s*).

(*z*) *Nugent* v. *Smith*, (1876) 1 C. P. D., 18, 423.

(*a*) *Siordet* v. *Hall* (1828), 4 Bing. 607. Rats causing a leak are not "act of God." *Dale* v. *Hall* (1750), 1 Wils. 281. *Sed quære*, whether, on principle, if the shipowner could show that no care or diligence reasonably to be expected of him could prevent there being some rats on a ship, he would not bring himself within the exception.

Article 81.—*The Queen's Enemies.*

This exception refers to the enemies of the sovereign of the shipowner (*b*). It probably only refers to states recognised as at war with the sovereign, and not to pirates or traitorous subjects (*c*), or to states at peace with the sovereign (*d*).

Note.—A few bills of lading add the exception "$\frac{\text{and}}{\text{or}}$ the enemies of the ruler of the place the steamer may be in." *Quære*, whether the original exception also refers to the enemies of the sovereign of the shipper. Probably not, for: (1.) The shipowner would hardly need to stipulate for protection against what would be a vice of the goods themselves (*e*). (2.) As the Declaration of Paris protects enemies goods in neutral vessels, it is not probable that such an exception would have much application, as the shipper's enemy could not delay the neutral ship, while if the goods were contraband, the vice in the goods themselves would free the shipowner from liability.

Case 1.—F., merchants in Russia, shipped wheat in a ship belonging to A., a subject of the Duke of Mecklenburgh, to be carried to England under a bill of lading containing an exception "the King's enemies." The Duke was at war with Denmark, and the ship was captured by the Danes. *Held*, that the exception certainly included enemies of the shipowner's sovereign, and the shipowner was therefore freed (*b*).

Case 2.—F. shipped goods under a bill of lading, excepting "the Queen's enemies." Ship and goods were confiscated by the Spanish Courts for violations of the revenue laws, Spain being at peace with England. *Held*, that such confiscation did not come within the exception (*f*).

Article 82.—*Arrests or Restraints of Princes, Rulers, and Peoples* (*g*).

This exception applies to forcible interferences by a state or the government of a country taking possession of the goods by a strong hand, such as arrest, embargoes (*h*), or block-

(*b*) *Russell* v. *Niemann* (1864), 17 C. B., N. S. 163.

(*c*) See the *Master of the Marshalsea's case*, and comments thereon, Holmes' Common Law, pp. 177, 201. *Forward* v. *Pittard* (1785), 1 T. R. 27, per Lord Mansfield, p. 34.

(*d*) *Spence* v. *Chodwick* (1847), 10 Q. B. 517.

(*e*) See per Willes, J., *arguendo* in *Russell* v. *Niemann*, *vide supra*, at p. 171.

(*f*) *Spence* v. *Chodwick*, *v.s.* It would be a "seizure" under an insurance policy: *Cory* v. *Burr* (1883), L. R. 8 App. C. at p. 405.

(*g*) "Revolutions, riots, or emeutes" are occasionally added.

(*h*) *Rotch* v. *Edie* (1795), 6 T. R. 413.

ades (*i*); to government actions for other purposes, indirectly resulting in the detention of the goods (*k*); to the decrees of a Prize Court after capture (*l*); or to embargoes imposed by the government of the shipowner (*m*).

It does not apply to ordinary legal proceedings in the courts of a state with their result (*n*), nor to the proceedings of a number of people not professing to act legally or by government authority (*o*), nor to rumours of restraints of princes (*p*).

Case 1.—Goods were insured (*q*) from Japan to London viâ Marseilles $\frac{\text{and}}{\text{or}}$ Southampton, by a line of steamers whose practice was to send goods by land from Marseilles to Boulogne, viâ Paris. One of the risks insured against was "arrests, restraints, and detainments of all kings, princes, and peoples." On arriving at Paris the goods were detained by the siege of Paris by the Germans, though not by any express order dealing with the goods. *Held*, a peril insured against (*r*).

Case 2.—F. shipped goods under a bill of lading excepting "acts or restraints of princes or rulers." The goods were detained by an order of the State of New York in a civil action. *Held*, not to come within the exception (*n*).

Case 3.—Goods were insured against "arrests, restraints, and detainments of all kings, princes, and peoples." The vessel was seized by a tumultuous mob and the goods taken out of her. *Held*, not within the perils insured against, as "peoples" mean "the governing power of the country" (*t*).

Case 4.—A ship chartered to load at St. Petersburg, with exceptions of "restraints of princes and rulers," left without loading a full cargo in consequence of rumours that a hostile embargo and seizure were about to be imposed. The jury found that such apprehensions were reasonable at the time, and that such an embargo was actually imposed six weeks later. *Held*, no defence to an action by the charterer, as the "restraints" excepted must be actual and operative, not merely expected and contingent (*u*).

Note.—The risk, "capture, and seizure," common in insurance policies, rarely if ever occurs in bills of lading. The two risks

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(*i*) *Geipel* v. *Smith* (1872), L. R. 7 Q. B. 404.
(*k*) *Rodoconachi* v. *Elliott* (1874), L. R. 9 C. P. 518.
(*l*) *Stringer* v. *English & Scottish Mar. Ins. Co.* (1870), L. R. 5 Q. B. 599.
(*m*) *Aubert* v. *Gray* (1861), 3 B. & S. 163.
(*n*) *Finlay* v. *Liverpool & G. W. Co.* (1870), 23 L. T. 251.
(*o*) *Nesbitt* v. *Lushington* (1792), 4 T. R. 783.
(*p*) *Atkinson* v. *Ritchie* (1809), 10 East, 530.
(*q*) I have used insurance cases, as illustrations, when the different principles of construction do not affect the case.
(*r*) *Rodoconachi* v. *Elliott* (1874), L. R. 9 C. P. 518.
(*t*) *Nesbitt* v. *Lushington* (1792), 4 T. R. 783. This would be a "seizure." See note, *post*.
(*u*) *Atkinson* v. *Ritchie* (1809), 10 East, 530. *Sed quære*, whether the master would not be excused on the doctrine of *The Teutonia* (1872), L. R. 4 P. C. 171.

have been defined in *Cory* v. *Burr* (*x*) thus: "Capture" includes every act of seizing or taking by an enemy or belligerent, whether in reprisals or war; thus where a vessel was sunk by the Russians in the attempt to detain her, before war had broken out, it was held a "capture" (*y*).

"Seizure" includes every act of taking forcible possession, either by a lawful authority or by overpowering force, whether such seizure be justified by law or not, or whether it be belligerent or not: thus a seizure of a ship by coolie passengers was held a "seizure" (*z*).

The difference therefore between the three exceptions is this:

"*The King's enemies*" covers belligerent acts of states, other than that of the owner of the vessel.

"*Restraints of princes or rulers*" includes this, and also covers restraints of the sovereign power in peace, whether of the carrier's country or not, other than the ordinary consequences of legal proceedings.

"*Capture and seizure*" includes all captures or seizures resulting from the above sources, and also all seizures resulting from ordinary legal proceedings or from private overwhelming force.

Article 83.—*Perils of the Seas.*

This exception is usually expanded into "all and every other dangers and the accidents of the seas, rivers, and [steam] navigation of whatsoever nature and kind soever excepted."

Submitted.—This exception includes all perils peculiar to the sea and navigation, as to which the shipowner can show that they could not have been prevented by anybody by any amount of foresight and care reasonably to be expected of man (*a*).

Note.—As so defined, "perils *of* the sea," which are not the same as perils *on* the sea (*b*), will be identical with those "acts of God," where the effective cause is one peculiar to the sea.

(*x*) (1883), L. R. 8 App. C. at p. 405.

(*y*) *Powell* v. *Hyde* (1855), 5 E. & B. 607.

(*z*) *Kleinwort* v. *Shephard* (1859), 1 E. & E. 447. See also *Johnston* v. *Hogg* (1883), L. R. 10 Q. B. D. 432; *Ionides* v. *Universal Marine Ins. Co.* (1863), 14 C. B., N. S. 259.

(*a*) See *per* Lord Esher, in *Pandorf* v. *Hamilton*, C. A., Aug. 9, 1886. Not yet reported, except in 2 Times L. R. 891.

(*b*) See the similar remark as to "perils of the roads," by Parke, B., in *Rothschild* v. *R. M. Steam Packet Co.* (1852), 7 Ex., at p. 743.

Thus frost or lightning (*c*), as effective causes of loss, will be acts of God, but not perils of the sea; damage by swordfish or icebergs (*d*) would be a peril of the sea, if the shipowner could not have prevented it by reasonable care. The difficulty in the way of this definition is the case of *Pickering* v. *Barkley* (*e*), which held, on the evidence of merchants as to usage, that pirates were perils of the sea. But it is almost impossible to find any principle reconciling *Pickering* v. *Barkley* with *Woodley* v. *Michel* (*f*), where it was held that a collision by negligence of another ship was not a peril of the sea. I am not aware of any peril of the sea, except pirates, which is not also an "act of God" within Article 80.

The exception includes:—

(*a.*) A collision occuring without negligence of either ship (*g*).

(*b.*) Damage to the goods by rough weather beyond the ordinary wear and tear of the voyage, the stowage not being negligent (*h*).

(*c.*) Captures by pirates (*i*) or wreckers (*k*).

(*d.*) Damage received while in dock without negligence, if the docking is in the course of the voyage (*l*); but not if the docking is not in pursuance of a voyage: as where the ship was blown over in a graving dock by a squall (*m*).

(*e.*) Stranding not incurred as part of the navigation, unless the shipper proves negligence (*n*). Thus damages through taking the ground in the ordinary course of navigation in a dry harbour, or hauling up on the beach to repair, will not be perils of the sea (*o*). But it will be a peril of the sea if owing to stress of weather, something different from the ordinary course of navigation occurs without negligence: as where a heavy swell bumped the ship on a hard bottom (*p*), or where

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(*c*) The suggestion *arguendo* by Pollock, C.B., in *Lloyd* v. *General Coll. Co.* (1864), 3 H. & C., at p. 290, that lightning is a peril of the sea is, it is submitted, erroneous.

(*d*) But not worm, *Rohl* v. *Parr* (1796), 1 Esp. 445.

(*e*) (1672), Styles, 132.

(*f*) (1883) (C. A.) 11 Q. B. D. 47.

(*g*) *Buller* v. *Fisher* (1800), 2 Peake, 183; *The Xantho*, June 9, C. A. (1886). Not reported, except in 2 Times L. R. 701.

(*h*) *Lawrence* v. *Aberdein* (1821), 5 B. & A. 107; *Gabay* v. *Lloyd* (1825), 3 B. & C. 793; *The Catherine Chalmers* (1875), 32 L. T. 847.

(*i*) *Pickering* v. *Barclay* (1672), Styles, 132.

(*k*) *Bondrett* v. *Hentigg* (1816), Holt, 149.

(*l*) *Laurie* v. *Douglas* (1846), 15 M. & W. 746.

(*m*) *Phillips* v. *Barber* (1821), 5 B. & A. 161.

(*n*) *The Norway* (1864), B. & L. 404.

(*o*) *Magnus* v. *Buttemer* (1852), 11 C. B. 876; *Thompson* v. *Whitmore* (1810), 3 Taunt. 227.

(*p*) *Fletcher* v. *Inglis* (1819), 2 B. & A. 315.

damage is caused in the ordinary course of navigation by an unseen peril, which could not have been detected by reasonable care, as where a ship takes the ground over an unknown hole and strains herself (*l*).

The exception will not include:—

(*a.*) Collisions where either or both ships are to blame (*m*).
(*b.*) Damage resulting from the ordinary wear and tear of the voyage, which must be provided against by proper packing by the shipper, proper stowage by the shipowner.
(*c.*) Any cases where the damage can be traced to negligence on the part of the shipowner or his servants in the stowage or management of the vessel (*n*).
(*d.*) Damage resulting from original unseaworthiness of the vessel (*o*).
(*e.*) Damage from war (*p*).
(*f*) Damage from confiscation by foreign Courts, or the consequences of actions at law (*q*).
(*g.*) Barratrous acts of the crew (*r*).
(*h.*) Damage done by rats, or vermin, to the cargo, directly or indirectly (*s*).

Case 1.—Goods were lost through a collision with another ship, neither vessel being to blame. *Held*, that such a collision was a peril of the seas (*t*).

Case 2.—Goods were damaged through a collision caused by the negligence of the carrying ship. *Held*, not a peril of the seas (*u*).

Case 3.—Goods were damaged by a collision on the Thames, caused by the negligence of the other ship, winds and waves not contributing. *Held*, not a peril of the seas (*x*).

(*l*) *Letchford* v. *Oldham* (1880), L. R. 5 Q. B. D. 538. See also *Rayner* v. *Godmond* (1821), 5 B. & A. 225.

(*m*) *Lloyd* v. *General Iron Colliery Co.* (1864), 3 H. & C. 284; *Grill* v. *Same* (1868), L. R. 3 C. P. 476; *Chartered Bank* v. *Netherlands Co.* (1883), 10 Q. B. D. 521; *Woodley* v. *Michel* (1883), 11 Q. B. D. 47, and see Article 84.

(*n*) *The Oquendo* (1878), 38 L. T. 151; *The Freedom* (1871), L. R. 3 P. C. 594; *The Figlia Maggiore* (1868), L. R. 2 A. & E. 106.

(*o*) *The Glenfruin* (1885), 10 P. D. 103, and see Article 29.

(*p*) *The Patria* (1871), L. R. 3 A. & E. 436.

(*q*) *Spence* v. *Chodwick* (1847), 10 Q. B. 517; *Benson* v. *Duncan* (1849), 3 Ex. 644.

(*r*) *The Chasca* (1875), L. R. 4 A. & E. 446.

(*s*) *Kay* v. *Wheeler* (1867), L. R. 2 C. P. 302; *Laveroni* v. *Drury* (1852), 8 Ex. 166. *Pandorf* v. *Hamilton* (C. A.), Aug. 9, 1886; not yet reported, except in 2 Times L. R. 891, reversing Lopes, L. J. in Court below, reported at 16 Q. B. D. 629; *Dale* v. *Hall* (1750), 1 Wils. 281, has decided that "rats" are not the "act of God," on which see Article 81, note (*a*). Rats are perils of the ship, not perils of the sea. See per Bowen, L.J., in *Pandorf* v. *Hamilton*, *supra*.

(*t*) *Buller* v. *Fisher* (1800), 2 Peake, 183; *The Xantho* (1886); not yet reported, except in 2 Times L. R. 704.

(*u*) *Lloyd* v. *General Colliery Co.* (1864), 3 H. & C. 284.

(*x*) *Woodley* v. *Michel* (1883), C. A., 11 Q. B. D. 47. Whether it is a "peril

Case 4.—Goods were shipped under a bill of lading excepting "dangers and accidents of the seas, rivers, and steam navigation of whatever kind." The goods were not delivered: the shipowners admitted that they were lost by collision. It was not shown how the collision occurred. *Held*, that the cargo-owners having proved failure to deliver, the shipowners must prove loss by one of the excepted perils, and that as collision was not a peril of the sea, but only collision without negligence of anyone, they had failed to do so, and were therefore liable (*y*).

Case 5.—Cattle were insured against perils of the sea; they were properly stowed, but the violence of the weather killed some and bruised others. *Held*, damage by perils of the sea (*z*).

Case 6.—Goods shipped were stowed in a place specially exposed to the waves, and in rough weather were damaged by salt water. *Held*, that the improper stowage took the damage out of the exception (*a*).

Case 7.—Owing to bad weather a ship's hatches were kept closed, and the cargo putrefied. *Held*, that improper stowage and lack of ventilation took the case out of the exception "perils of the seas" (*b*).

Case 8.—Goods were shipped with an exception "all and every the dangers and accidents of the seas and navigation." While the ship was discharging her cargo in dock, moored to a barge and a lighter, owing to ropes breaking she capsized, and the goods were damaged. *Held*, a "danger of navigation" within the exception (*c*).

Case 9.—Goods were damaged by sea water let into the hold by the barratrous act of the crew in boring holes in the ship. *Held*, not a loss by perils of the sea (*d*).

Case 10.—Goods were damaged on the voyage by rats. The shipowner, who had two cats and a mongoose on board and had employed a professional ratcatcher, was found to have taken every precaution. *Held*, that such damage by rats was not a peril of the sea or of navigation (*e*).

Case 11.—On a voyage rats ate a hole in a leaden pipe, and so let seawater into the ship, damaging the cargo. *Held*, a peril of the ship, not a peril of the sea (*f*).

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of navigation" is now waiting decision before the C. A. in the case of *S. S. Garston* v. *Hickie Borman*.

(*y*) *The Xantho* (1886), C. A., *vide supra*, following *Woodley* v. *Michel*. An appeal to the House of Lords, is, I believe, contemplated. See also, on cases 1–4, *Chartered Bank* v. *Netherlands Co.*, *vide supra*, and Article 84, *post*. *Semble*, that a collision partly caused by bad weather, partly by negligence, is not a peril of the sea under a bill of lading. See judgment of Brett, M.R., in *Woodley* v. *Michell*, *v.s.*

(*z*) *Laurence* v. *Aberdein* (1821), 5 B. & A. 107; see also *Tatham* v. *Hodgson* (1796), 6 T. R. 656.

(*a*) *The Oquendo* (1878), 38 L. T. 151; see also *The Catherine Chalmers* (1875), 32 L. T. 847.

(*b*) *The Freedom* (1871), L. R. 3 P. C. 594, 603; see also *The Figlia Maggiore* (1868), L. R. 2 A. & E. 106. Where goods properly stowed putrefy through extraordinary delay caused by bad weather, *semble*, that the shipowner will be excused by the exception "perils of the sea," though such damage would not be a peril of the sea for which underwriters would be liable. See *Taylor* v. *Dunbar* (1869), L. R. 4 C. P. 206; *Tatham* v. *Hodgson*, *v.s.*

(*c*) *Laurie* v. *Douglas* (1846), 15 M. & W. 746.

(*d*) *The Chasca* (1875), L. R. 4 A. & E. 446.

(*e*) *Kay* v. *Wheeler* (1867), L. R. 2 C. P. 302.

(*f*) *Pandorf* v. *Hamilton* (C. A.), Aug. 9, 1886; not yet reported, except in 2 Times L. R. 891, reversing Lopes, L.J., in Court below; reported at 16 Q. B. D. 629.

Article 84.—*Collision.*

This exception in bills of lading, which also except "perils of the sea," protects the shipowner from damage caused by the negligence of another ship, for which he otherwise would be liable (*g*).

Semble, in bills of lading which do not except "negligence of the shipowner's servants," it throws upon the shipper the burden of proving such negligence (*h*).

Case.—Goods were shipped on the *S.* under a bill of lading excepting collisions, and loss resulting from the negligence of A.'s servants in navigating the ship. Through a collision between the *S.* and the *R.*, also belonging to A., the goods were lost. Both ships were in fault. *Held*, that A. was not liable on the contract in the bill of lading, the exception "collision" covering the negligence on board the *R.*, the exception "negligence" covering the negligence on board the *S.*, but that A. was liable in an action based on tort, for the negligence of the *R.* (*i*).

Note.—The result is, that a bill of lading with the three exceptions—perils of the sea, collisions, and the ordinary exception of negligence, covers all collisions, with the slight exception of those caused by the personal negligence of the owner (*k*). A bill of lading, excepting perils of the sea and negligence, covers all collisions, except those caused solely by negligence of the other ship. A bill of lading excepting perils of the sea and collision, covers all collisions, except those caused partly by negligence of the carrying ship, and throws the burden of proving such negligence on the shipper. A bill of lading excepting perils of the seas only, covers collisions occurring without negligence of either ship, but compels the shipowner to prove the absence of negligence (*l*).

(*g*) *Woodley* v. *Michel* (1883), 11 Q. B. D. 47. When the other ship is negligent, her owner will be liable to the shipper in an action of tort; and the fact that her owner is also the owner of the carrying ship, and protected by the exceptions in the bill of lading, will not help him: *Chartered Bank* v. *Netherlands Co.* (1883), 10 Q. B. D. 521.

(*h*) *Czech* v. *General Steam Co.* (1867), L. R. 3 C. P. 14.

(*i*) *Chartered Bank* v. *Netherlands Co.*, *vide supra*. Some remarks of Brett, L.J., seem to suggest that negligence on the *R.* was not within A.'s contract, but this is contrary to *Woodley* v. *Michel*, *vide supra*.

(*k*) See per Brett, L.J., 10 Q. B. D. 532.

(*l*) *The Xantho*, June 9 (1886), not yet reported, except in 2 Times L. R. 704.

Article 85.—*Pirates, Robbers by Land or Sea, Thieves.*

The exception "robbers" refers to robbers by violence, external to the ship (*m*), and does not include secret theft (*n*).

The exception "thieves" refers to thieves external to the ship (*n*).

Theft or mutinous seizure by the crew, if reasonable precautions have been taken to prevent them, are probably barratry.

Case 1.—A box of diamonds was shipped with the exceptions, "pirates, robbers, thieves, barratry of master and mariners." The box was stolen before delivery; there was no evidence to show by whom. *Held*, that thieves meant "thieves external to the ship." That even if theft by the crew was barratry, still as the shipowners must prove the loss to fall within one of the exceptions (*o*) (and it might have been the act of a passenger, who was certainly not within the exceptions), the shipowner was liable (*n*).

Case 2.—Goods were shipped from P. to London, under exceptions, "robbers, the dangers of the seas, roads, and rivers." The goods were stolen in transit by rail from Southampton to London. *Held*, that "robbers" meant robbers by violence, and the shipowner was liable (*m*).

Note.—Loss by pirates has been held a peril of the sea, so the advantage of the exception "pirates" is not very great. It however relieves the shipowner of the burden of proving that the loss was not caused by his negligence (*p*). Mutinous seizure by the passengers has been held "piracy" under an insurance policy (*q*).

The cases above are sometimes met by such exceptions as "thieves, whether on board or not," "pilferage," or "plunder of goods by crew or stevedores." Many bills of lading, however, adopt the cases by inserting the exception, "thieves by land or sea, but not pilferage."

Article 86.—*Loss or Damage from Leakage* (*r*), *Breakage, Heat, Sweat, Rust, &c.*

If reasonable care is used in the stowage of goods, this exception protects the shipowner from liability for any

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(*m*) *Rothschild* v. *Royal Mail Co.* (1852), 7 Ex. 734. The phrase "assailing thieves" is sometimes used.

(*n*) *Taylor* v. *Liverpoool S. S. Co.* (1874), L. R. 9 Q. B. 546.

(*o*) *Semble*, that if the shipowner had proved theft by the crew, *i.e. primâ facie* barratry, the *onus* of proving negligence of the owner or master would then be on the shipper.

(*p*) *Czech* v. *General Steam Co.* (1867), L. R. 3 C. P. 14.

(*q*) *Palmer* v. *Naylor* (1854), 10 Exch. 382.

(*r*) An attempt to limit "leakage" to "ordinary leakage," said by the custom of trade to be one per cent., failed in *Ohrloff* v. *Briscall* (1866), 4 Moore P. C., N. S. 70, 77.

damage or loss to the goods which leak, break, heat, sweat, rust, &c.

It does not by itself protect him from liability for damage resulting from negligent stowage (*s*), (though it throws the burden of proving such negligence on the shipper (*t*)), nor from liability for damage to goods from the leakage, &c., of other goods (*u*).

Case 1.—Goods were shipped, "to be free of breakage, leakage, or damage." On discharge the goods were found damaged by oil. There was no oil in the cargo, but oil was used in the donkey-engine in an adjacent part of the ship. *Held*, that the exception did not relieve the owner from liability for the negligence of his servants, but threw the burden of proving such negligence on the shipper (*t*).

Case 2.—Sugar was shipped, "not liable for leakage." It was damaged by leakage from other sugar which accumulated owing to insufficient means of drainage. *Held*, that the accumulation of leakage was the cause of the damage, and that the exception did not cover this (*x*).

Case 3.—Palm-baskets and barrels of oil were shipped, "not accountable for rust, leakage, or breakage." The oil leaked and damaged the palm-baskets. *Held*, the exception only covered the leakage of the oil, and not the damage to the baskets, by such leakage (*y*).

Article 87.—*Fire.*

This exception by itself will only protect against fires not caused by the shipowner's negligence, as in stowing cargo improperly, but it will throw the burden of proving such negligence on the shipper (*t*).

If a fire results from spontaneous combustion, due to the dangerous condition of the goods, of which the shipowner could not reasonably know, this exception will protect him, but shippers of other goods damaged will have their remedy against the shippers of the dangerous goods (*z*).

Fire caused by lightning will be an "act of God."

(*s*) *Phillips* v. *Clark* (1857), 2 C. B., N. S. 156, see *per* Willes, J.

(*t*) As in *Czech* v. *General Steam Co.* (1867), L. R. 3 C. P. 14.

(*u*) *The Nepoter* (1869), L. R. 2 A. & E. 375; *Thrift* v. *Youle* (1877), L. R. 2 C. P. D. 432. This source of liability is often met by an exception of "contact with or smell or evaporation or taint from other goods;" or "injurious effects from other goods."

(*x*) *The Nepoter* (1869), L. R. 2 A. & E. 375. Case 3 shows that the exception did not cover the damage by leakage, even without accumulation.

(*y*) *Thrift* v. *Youle* (1877), L. R. 2 C. P. D. 432.

(*z*) See *ante*, Article 31. The special exceptions "spontaneous combustion,

Article 88.—*Barratry of Master or Mariners.*

This exception covers any wilful act of wrong done by the master or mariners against the ship and goods, though with the intention of benefiting the shipowner. Barratry of the mariners includes any crime or fraud causing loss of or damage to the goods, committed by them under such circumstances that they could not reasonably have been prevented by the owner or the master.

Acts to the best of a man's judgment, though erroneous, or through honest incompetence, or illegal acts done by the owner's instructions, or acts whose commission has only been rendered possible by the owner's negligence in appointing a drunken or incapable captain (*a*), will not come under the exception "barratry" (*b*).

The following acts are barratrous:—

Boring holes in a ship to scuttle it (*c*); illegal trading with the enemy, or smuggling (*d*); intentional breach of port rules, so that the ship is forfeited or detained (*e*); intentional breach of blockade without owner's authority (*f*); fraudulent deviations from course (*g*).

The following acts are not barratrous:—

Deviation, unless accompanied by fraud or crime (*h*); failure

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burning from heat of machinery," are sometimes found; as also an exception protecting the shipowner against fire, at any time while the goods are in his custody, whether afloat or ashore. The exception "fire on board," does not relieve the shipowners from the liability for general average contribution to the owner of goods damaged by water used in extinguishing a fire on board. *Schmidt* v. *Royal Mail Co.* (1876), 45 L. J. Q. B. 646.

(*a*) See per Brett, L. J., 10 Q. B. D. 532.

(*b*) Arnould on Marine Insurance, 5th ed. p. 761; Lord Hardwicke, in *Lewin* v. *Suasso* there cited. Lord Ellenborough, in *Earle* v. *Rowcroft* (1806), 8 East, at p. 139; *Atkinson* v. *G. W. Insurance Co.* (1872), 27 L. T. 103 (Am.)

(*c*) *The Chasca* (1875), L. R. 4 A. & E. 446; *Ionides* v. *Pender* (1873), 27 L. T. 244.

(*d*) *Earle* v. *Rowcroft* (1806), 8 East. 126; *Havelock* v. *Hancill* (1789), 3 T. R. 277; *Pipon* v. *Cope* (1808), 1 Camp. 434.

(*e*) *Knight* v. *Cambridge*, cited 8 East 135; *Robertson* v. *Ewer* (1786), 1 T. R. 127.

(*f*) *Goldschmidt* v. *Whitmore* (1811), 3 Taunt. 508.

(*g*) *Ross* v. *Hunter* (1790), 4 T. R. 33.

(*h*) *Earle* v. *Rowcroft, vide supra*; *Phyn* v. *Royal Exchange Co.* (1798), 7 T. R. 505.

to observe rules of navigation, without fraud, though such failure is by statute to be taken as wilful default (*i*); stowing goods on deck, in spite of shipper's remonstrance (*k*).

Article 89.—*Negligence of the Master, Mariners, and other Servants of the Shipowner* (*l*).

The tendency of the Courts is to construe this and similar exceptions strongly against the shipowner; they will not protect him from the consequences of his own personal negligence, as in negligently appointing a drunken or incompetent captain, or in negligently giving orders that no pilot should be employed (*m*).

This exception, or any other will not apply, unless clearly worded to that effect, to relieve the shipowner from the consequences of a breach of his implied undertaking (*n*) that the ship should be seaworthy at starting (*o*).

Case 1.—Cargo was shipped, under an exception, "negligence or default of master or mariners or others performing their duties." Through careless stowage by master and crew the cargo was damaged. *Held*, the exception freed the shipowner from liability (*p*). *Submitted*, that it would not have done so, if the stowage had made the ship unseaworthy at starting (*o*).

Case 2.—Sugar was shipped under an exception of "loss from any act, neglect, or default of the pilot, master, or mariners on navigating the ship" . . . "the captain, officers, and crew of the vessel in the transmission of the goods, as between the shipper and the ship shall be considered the agents of the shipper." The sugar was negligently stowed. *Held*, by Denman, J.,

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(*i*) *Grill* v. *General Colliery Co.* (1866), L. R. 1 C. P. 600, at p. 610.

(*k*) *Atkinson* v. *G. W. Insurance Co.* (*Am.*) (1872), 27 L. T. 103.

(*l*) This exception assumes various forms. See Note 1.

(*m*) *Per* Brett, L.J., 10 Q. B. D. 532. See also *Worms* v. *Storey* (1855), 11 Ex. at p. 430 (repairs); *Grill* v. *General Colliery Co.* (1868), L. R. 1 C. P. 600, 3 C. P. 476, at p. 481 (navigation); *Laurie* v. *Douglas* (1846), 15 M. & W. 746 (management of cargo): discussed in *Notara* v. *Henderson* (1872), L. R. 7 Q. B. at p. 236.

(*n*) *Steel* v. *State Line Co.* (1878), 3 App. C. 72; and Article 29.

(*o*) See *The Glenfruin* (1885), 10 P. D. 103; where though "accidents to machinery" were excepted in the bill of lading, loss caused by the breaking of a crankshaft through a latent flaw, not discoverable by diligence on the part of the shipowner, was held not within the exception; *Tattersall* v. *National Steam Ship Co.* (1884), 12 Q. B. D. 297; and *Leuw* v. *Dudgeon* (1867), L. R. 3 C. P. 17 note, where cattle were shipped under a bill of lading containing the exception, "the owners will not be liable for any loss arising from suffocation or other causes to cattle." Cattle were lost through suffocation, resulting from the ship's capsizing through insufficient ballast being provided, through owner's negligence. *Held*, that this prevented the exception from applying. And see Note 2.

(*p*) *The Duero* (1869), L. R. 2 A. & E. 393.

that the damage did not occur "in navigating the ship"; by the Court of Appeal that the damage, resulting from the act of the stevedore, was not within the exception (*q*),

Note 1.—The original form of this exception was "loss or damage arising from collision or other accidents of navigation occasioned by default of the master or crew." But this was held not to free the shipowner from actual negligence of his servants (*r*). It now takes various forms; e.g. "act, neglect or default of the pilot, master, or mariners, or other servants of the shipowner;" engineers, stokers, and stevedores are sometimes expressly included; and the exception sometimes also covers "any person for whose conduct the owners would otherwise be responsible, whether on board this or any other vessel"; or "on any other ship belonging to or chartered by the company" (*s*). The exception sometimes applies to "navigation," sometimes to "navigation and management," or "navigation or otherwise;" or "providing, despatching, or navigating the ship or otherwise;" or "whether such neglect do occur before or during the voyage, or at the port of discharge." This form of clause is frequently combined with the exception expressly negativing the implied undertaking of seaworthiness (*t*). It sometimes concludes, "it being agreed that the captain, officers, and crew in transmission of the goods, as between shipper, owner, and consignee thereof, and shipowners, are to be considered servants of such shipper, owner, or consignee." The following clause has lately been used as a compromise, viz., "strandings and collisions and all losses occasioned thereby are excepted, even when occasioned by negligence, default or error in judgment of the pilot, master, or mariners and other servants of the shipowner, but nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo caused by bad stowage, by improper or insufficient dunnage or ventilation, or by improper opening of valves, sluices, and ports."

Note 2.—It is not quite clear how far "negligence in navigating the ship" covers bad stowage, or negligence before the starting of the ship. In *The Warkworth* (*u*); a negligent inspection of the steam-steering gear by an overlooker on shore, whereby the ship steered badly and did damage, was held "improper navigation" within 25 & 26 Vict. c. 63, s. 54, which limits the owner's liability, and Bowen, L.J., defined it as "improper navigation by the owner of the ship or his agents, including using a ship which is not in a condition to be so employed." In *Good* v. *London Mutual Association* (*x*), leaving a sea-cock and bilge-cock open whereby seawater entered the

(*q*) *Hayn* v. *Culliford* (1878), L. R. 3 C. P. D. 410; 4 C. P. D. 182.
(*r*) See note (*m*) *ante*, p. 166.
(*s*) To meet *Chartered Bank* v. *Netherlands Co.* (1883), 10 Q. B. D. 521.
(*t*) *Vide ante*, note to Article 29.
(*u*) (1884), L. R. 9 P. D. 20, 145.
(*x*) (1871), L. R. 6 C. P. 563.

hold, was held "improper navigation" within a club insurance policy; Willes, J., defining the phrase as "something improperly done with the ship or part of the ship in the course of the voyage." Being asked *arguendo* whether bad stowage would be improper navigation, Willes, J., said, "Certainly, unless in a port where stevedores are employed" (the qualification being the point taken by the Court of Appeal in *Hayn* v. *Culliford* (*y*), while M. Smith, J., qualified this as "bad stowage which affects the safe sailing of the ship." This seems to point to the principle of the *The Glenfruin* (*z*). Bad stowage by the master or crew, not affecting the seaworthiness of the ship, would, it is submitted, be "improper navigation" within the exception, as would other negligent acts in preparing for or ending the voyage: see *Laurie* v. *Douglas* (*a*).

Note 3.—The exception, "*at merchant's risk*," in a clause for the benefit of the shipowner, has been *held* to cover any damage done by the negligence of the master or crew acting as agents of the shipowner, as in cases of improper jettison, or collision or stranding arising from negligence, but not to cover any damage done by master or crew acting in case of necessity as agents of the cargo-owner, as in a case of a proper jettison, giving rise to a general average contribution (*b*).

Article 90.—*Jettison.*

This exception will cover all claims made under the bill of lading and arising from the improper jettison of goods properly stowed; *semble*, that it will not cover claims arising out of the jettison of goods improperly stowed (*c*).

Submitted, that it will not cover any claims for a general average contribution arising from proper jettisons of goods (*d*).

Article 91.—*Operation of Exceptions.*

The arrival of the ship (*e*) coupled with failure to deliver the goods, is *primâ facie* evidence of negligence in the ship-

(*y*) *Hayn* v. *Culliford* (1878), L. R. 3 C. P. D. 410; 4 C. P. D. 182.
(*z*) See note (*o*) *ante*, p. 166.
(*a*) See note (*m*) *ante*, p. 166.
(*b*) *Burton* v. *English* (1883), L. Q. 12 Q. B. D. 218.
(*c*) *Newall* v. *Royal Exchange Co.* (1885), 33 W. R. 342, 868, *sed quære*, when the improper stowage is not the cause of the jettison. This case is now under appeal to the House of Lords. See also Article 110.
(*d*) On authority of *Schmidt* v. *Royal Mail Co.* (1876), 45 L. J. Q. B. 646; *Crooks* v. *Allan*, (1879), L. R. 5 Q. B. D. 38.
(*e*) The non-arrival of the ship is not evidence of negligence at all. *Boyson* v. *Wilson* (1816), 1 Stark. 236.

owner (*f*). The shipowner must show that the real cause of the loss was one of the exceptions in the bill of lading, in order to free himself (*f*).

If he makes a *primâ facie* case to this effect, the shipper must then disprove it by shewing that the real cause of the loss was something not covered by the exceptions: and unless he can prove this clearly, the shipowner will be protected (*g*).

Exceptions in the bill of lading will not affect the rights and liabilities of shipper and shipowner as to general average contributions (*h*), unless they are clearly intended to do so (*i*).

Case 1.—Goods shipped under a bill of lading, excepting "perils of the sea," were lost on the voyage. The shippers proved non-delivery, and it was admitted that the goods were lost by collision. *Held*, that as collision is not a peril of the sea, but only collision without negligence of either ship, the shipowners had not made even a *primâ facie* case of cause of loss within the exceptions, and were therefore liable (*f*).

Case 2.—Goods were shipped, "to be free from leakage or damage." On discharge the goods were found damaged by oil. There was no oil in the cargo, but oil was used in the donkey engine in an adjacent part of the ship. *Held*, that the exception did not relieve the owner from liability for the negligence of his servants, but threw the burden of proving such negligence on the shipper (*k*).

Article 92.—*Who can sue for failure to carry Goods safely.*

I. *In tort*, there can sue:—

All who have any proprietary interest in the goods, whether or not they are parties to the bill of lading. The consignee of goods will be deemed to have such a property unless the contrary appear (*l*).

(*f*) *The Xantho* (1886), C. A. June 9, not yet reported, except in 2 Times L. R. 704. Now under appeal to the House of Lords. Where goods are delivered damaged, see as to the burden of proof, Article 52.

(*g*) *The Norway* (1865), 3 Moore, P. C., N. S. 245; *Muddle* v. *Stride* (1840), 9 C. & P. 380. *Czech* v. *General Steam Co.* (1867), L. R. 3 C. P. 14. See also *Williams* v. *Dobbie* (1884), 11 Sc. Sess. Cases, 4th Series, 982.

(*h*) *Schmidt* v. *Royal Mail S.S. Co.* (1876), 45 L. J. Q. B. 646; *Crooks* v. *Allan* (1879), L. R. 5 Q. B. D. 38.

(*i*) *E.g.* "That the master, owner or agents of the vessel shall not be responsible either as carriers, or as contributors to general average, for any loss or injury to the said goods, occurring from any of the causes above-mentioned."

(*k*) *Czech* v. *General Steam Co.* (1867), *vide supra*.

(*l*) *Coleman* v. *Lambert* (1839), 5 M. & W. 502, at p. 505; *Tronson* v. *Dent* (1853), 8 Moore, P. C. 419.

The nominal shipper cannot sue in tort if he ships merely as agent for the real owner (*m*).

II. *In contract*, there can sue:—

(1.) The shipper, unless he acted merely as agent for another, in which case the principal can sue (*n*), the agent cannot (*m*).

(2.) Any person to whom by indorsement and delivery of the bill of lading, or by indorsement followed by delivery of the goods, the absolute property in the goods has passed (*o*).

(3.) The consignee named in the bill of lading if the property has passed to him by such consignment (*o*).

Article 93.—*Who can be sued for negligent carriage of the Goods.*

I. *The owner.*—1. *In tort*, if he is or was in possession of the goods by his agents, there being no charter amounting to a demise (*p*); 2. *in contract*, by any person with whom he has contracted, or by the assignees of such person.

II. *The charterer.*—1. *In tort*, if he is or was in possession of the goods, his charter amounting to a demise (*p*); 2. *in contract*, by any person with whom he has contracted, or the assigns of such person.

III. *The master.*—1. *In tort*, if he is or was in possession of the goods; 2. *in contract*, by any person to whom he has made himself personally liable on a contract.

The shipper or person entitled to sue can sue either the master, or the owner or charterer, but not both. If he has obtained judgment against the master, he cannot further sue the owner or charterer for the same cause (*q*).

(*m*) *Moore* v. *Hoppers* (1807), 2 B. & P. N. R. 411.

(*n*) *Anderson* v. *Clark* (1824), 2 Bing. 20; *Fragano* v. *Long* (1825), 4 B. & C. 219.

(*o*) 18 & 19 Vict. c. iii., s. 3, and Article 75. For cases before the Act on the ability of consignees to sue in contract: see *Tronson* v. *Dent*, *vide supra*; *Sargent* v. *Morris* (1820), 3 B. & A. 277.

(*p*) See Article 2.

(*q*) *Priestly* v. *Fernie*, 3 H. & C. 977 (1865); *Leslie* v. *Wilson*, 6 Moore, Ex. 415 (1821).

SECTION VII.

THE PERFORMANCE OF THE CONTRACT.—THE VOYAGE.

Article 94.—"*Final Sailing*" (*a*).

A VESSEL has finally sailed when she has left her port of loading (or her last port of call in the United Kingdom) (*b*), ready for her voyage, and with the purpose of proceeding on her voyage without any intention of coming back (*c*).

The fact that she is towed and has no sail set, or that she is driven back into port by a storm will not prevent her having "finally sailed" (*c*). But if her clearances are not on board, or she is not ready for sea, the fact that she has left the port will not constitute final sailing (*d*).

The term "port" is to be taken in its business, popular, and commercial sense (*c*), and not in its legal definition for revenue or pilotage purposes (*e*).

Case 1.—A ship was chartered, the owners to receive one-third of the freight within eight days, "from final sailing from her last port in the

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(*a*) Whether a vessel has "finally sailed" may be of importance as to the payment of "advance freight."

(*b*) "Sailing" in insurance cases, where there is a warranty to sail before a particular day, has been held to be "breaking ground," i.e., leaving her moorings ready for sea, though not leaving port; see Parke, B., in *Roelandts* v. *Harrison* (1854), 9 Ex. at p. 456, Arnould, 5th ed. 598–608.

(*c*) *Price* v. *Livingstone* (1882), L. R. 9 Q. B. D. 679; *Roelandts* v. *Harrison* (1854), 9 Ex. 444; *S. S. Garston* v. *Hickie* (1885), 15 Q. B. D. 580.

(*d*) *Thompson* v. *Gillespy* (1855), 5 E. & B. 209; *Hudson* v. *Bilton* (1856), 6 E. & B. 565.

(*e*) On the other hand, in *Caffarini* v. *Walker* (1876), 10 Ir. L. R. C. L. 250, and *McIntosh* v. *Sinclair* (1877), 11 Ir. Rep. C. L. 456, the "port of Newry," was taken in its legal and fiscal sense, and not as a geographical expression on the distinction. See also *Nicholson* v. *Williams* (1871), L. R. 6 Q. B. 632. In *Nielsen* v. *Wait* (1885), 14 Q. B. D. 516, the "port of Gloucester" seems to be taken as the legal or fiscal port. In *S. S. Garston* v. *Hickie*, *vide supra*, Brett, M.R., says, "the port may extend beyond the place of loading and unloading; if the port authorities are exercising authority over ships within a certain space of water, and shipowners are submitting to that jurisdiction, that is the strongest evidence that that space of water is accepted as the commercial port."

United Kingdom." She was loaded at Penarth, and towed out eight miles, bringing her three miles into the Bristol Channel, outside the commercial, but inside the fiscal port of Cardiff. She then cast anchor, owing to threatening weather. A storm arose, which drove her ashore within the commercial port of Cardiff. *Held*, that she had finally sailed from her last port, so as to entitle the owners to an advance of one-third of the freight (*f*).

Case 2.—A ship being loaded and cleared, came into the roads and cast anchor three miles from X. harbour, not intending to return. The shrouds and cables were not ready for sailing, bills of lading were not signed, and the mate was not on board. She was lost the same day, before the deficiencies were supplied. *Held*, she had not finally sailed (*g*).

Article 95.—*Master's Authority on the Voyage.*

The master on the voyage occupies a double position; he has the duty, on behalf of the shipowners, of doing what is necessary to carry out the contract (*h*), and of taking reasonable care of the goods entrusted to him, his first duty to the goods owner being to carry on the cargo safely in the same bottom (*i*), and he has also, if extraordinary steps are necessary, such as sale (*k*), borrowing money on bottomry (*l*), salvage agreements (*m*), transhipment (*n*), jettison (*o*), deviation or delay (*p*), the power to bind his owners, if such steps are shown to be necessary, and if there was no possibility of communication with his owners.

He can also bind the charterer by his actions in doing what is necessary on the charterer's part to carry out the contract, but not beyond, unless by express instructions (*q*).

(*f*) *Price* v. *Livingstone* (1882), L. R. 9 Q. B. D. 679. In *Roelandts* v. *Harrison*, *v.s.*, and *S. S. Garston* v. *Hickie*, *v.s.*, the port was also the port of Cardiff, the ship in each case was ready to sail, and in her way to sea, but had not got outside the commercial port.

(*g*) *Thompson* v. *Gillespy* (1855), 5 E. & B. 209; see also *Hudson* v. *Bilton* (1856), 6 E. & B. 565.

(*h*) *The Turgot* (1886), 11 P. D. 21; *The Beeswing* (1885), 53 L. T. 554.

(*i*) *The Hamburg* (1864), B. & L. 253, see p. 272; *The Gratitudine* (1801), 3 C. Rob. 240; *Notara* v. *Henderson* (1872), L. R. 7 Q. B. 225, *et post*, Article 101.

(*k*) See *Australasian S. Nav. Co.* v. *Morse* (1872), L. R. 4 P. C. 222; *et* Articles 102, 104.

(*l*) See *The Karnak* (1869), L. R. 2 P. C. 505, *et* Articles 105, 106, *post*.

(*m*) *The Renpor* (1883), L. R. 8 P. D. 115, and Article 121.

(*n*) *The Soblomsten* (1866), L. R. 1 A. & E. 293, and Article 103.

(*o*) *Burton* v. *English* (1883), 12 Q. B. D. 218, and Article 107.

(*p*) See Articles 99, 100.

(*q*) *The Turgot* (1886), 11 P. D. 21; *The Beeswing* (1885), 53 L. T. 554.

Thus the captain is the agent of the owners in providing those necessaries for the voyage which by the terms of the charter are to be paid for by the owners, or necessaries for the ship's sailing, where it is to the interest of the owners that the ship should sail (*r*): he is the agent of the charterers for providing those necessaries for the voyage which are by the charter to be paid for by the charterers, as coal (*s*).

The duty of protecting the interests of the cargo owner may devolve upon the master, from his possession of the goods; in this case, if his action was necessary, and there was no possibility of communication with the cargo owner, the action of the master will bind the cargo owner (*t*), as in salvage agreements (*u*), sale (*x*), borrowing money on *respondentia* (*y*), transhipment (*z*), jettison (*a*), delay or deviation (*b*). The master is always the appointed agent for the ship; he is in special cases of necessity the involuntary agent for the cargo owner; but the foundation of his authority is the prospect (*b*) of benefit, direct or indirect, to the cargo owner. Thus he may sell part of the cargo to carry on the rest, but may not sell the whole cargo unless it cannot profitably be carried further. He may not repair the ship at the sole expense of the cargo without reasonable prospect of benefit to such cargo, and such a prospect would not exist in the case of goods not injured by delay (*c*).

(*r*) Thus where the owners were to receive time freight, and the ship was detained through failure of the charterers to supply coal as per charter, it was held that the master had no authority to bind the owners by his orders for coal, as the owners gained nothing by expediting the sailing of the ship: *The Turgot* (1886), 11 P. D. 21. See also *Citizen's Bank* v. *Wendelin* (1886), 2 Times L. R. 240.

(*s*) *The Beeswing* (1885), 53 L. T. 554.

(*t*) *The Gratitudine*, *vide supra*, and see Articles 96, 97, 98.

(*u*) *The Renpor* (1883), L. R. 8 P. D. 115, and Article 121.

(*x*) See *Australasian S. Nav. Co.* v. *Morse* (1872), L. R. 4 P. C. 222, *et* Articles 102, 104.

(*y*) *The Onward*, L. R. 4 Adm. 38 (1873); *Kleinwort* v. *Cassa Marittima*, L. R. 2 App. C. 156 (1877), and Articles 104–106.

(*z*) *The Soblomsten* (1866), L. R. 1 A. & E. 293, and Article 103.

(*a*) *Burton* v. *English* (1883), 12 Q. B. D. 218, and Article 107.

(*b*) The fact that the cargo ultimately derives no benefit is immaterial, if there was a reasonable prospect of it: *Benson* v. *Chapman* (1848), 2 H. L. C. 696, at p. 720.

(*c*) *The Onward*, *v.s.*, at pp. 57, 58; see also per Brett, M.R., and Bowen, L.J., in the *Pontida* (1884), 9 P. D. at p. 180; *The Gratitudine* (1801), 3 C. Rob. at pp. 257, 261.

Article 96.—*Master's authority, whence derived.*

The authority of the master in the absence of express instructions to deal with the ship and goods in a manner not consistent with the ordinary carrying out of the contract, as by selling the goods, throwing them overboard, or pledging them for advances of money, depends on two circumstances:—

1. The necessity of the action: (Art. 97).
2. The impossibility of communicating with his principals, whether goods-owners or shipowners: (Art. 98).

Article 97.—*Necessity.*

Action will be *necessary* if it is apparently the best course for a prudent man to take in the interests of the adventure (*d*). The mere fact that the master acts in good faith is not sufficient (*e*).

Thus, if money can be obtained from the shipowner's or cargo owner's agent in the port, or raised on personal credit, the master will not be justified in binding the ship or cargo by a bottomry bond; but there will be necessity for such a course of action if the carriage of the cargo cannot be completed with profit to the cargo owner, without raising money on security of the cargo (*f*).

So, also, if damaged wool can either be sold as it is, or can be dried, repacked, and sent on, but at a cost to the owner clearly exceeding any possible value of it when so treated, the commercial necessity for the sale will arise; but if the goods can be carried on and delivered in a merchantable state, though damaged, the master will not be justified in selling (*g*).

Where such a necessity of dealing with the cargo arises, the captain in dealing with the cargo acts as the agent of the cargo owner (*h*); if no such necessity exists (*i*), or if the necessity

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(*d*) *The Onward*, *vide supra*, at p. 58; *Atlantic Insurance Co.* v. *Huth* (1880), L. R. 16 Ch. D. 474, at p. 481.

(*e*) *Tronson* v. *Dent* (1853), 8 Moore P. C. at pp. 448, *et seq.*; but the owner may be liable for an erroneous, though *bonâ fide*, use of the master's discretion: *Ewbank* v. *Nutting* (1849), 7 C. B. 797.

(*f*) *The Onward*, *vide supra*.

(*g*) See note (*x*) *ante*, p. 173.

(*h*) *Burton* v. *English* (1883), 12 Q. B. D. 218.

(*i*) As in the case of improper jettison or sale.

arises from wrongful acts or omissions on the part of the shipowner (*j*), or if the captain professes to act for the shipowner (*k*) he will be treated as the agent of the shipowner (*l*).

Article 98.—Communication with Owners.

The master, before dealing with the cargo in a manner not contemplated in the contract, must, if possible (*m*), communicate with the owners of the cargo as to what should be done. For the master's authority to bind the cargo owners rests upon the fact that the circumstances require immediate action in the interests of the cargo, and nobody but the master can decide what shall be done in time to take such immediate action. If the cargo owners can be communicated with and can give directions in time, the necessity for the master's action does not arise (*n*).

The possibility of communication must be estimated by consideration of the facts rendering immediate action necessary, the distance of the master from the cargo owners, and his means of communicating with them, the cost and risk incidental to the delay resulting from the attempt to make such communication, and the probability of failure after every exertion should have been made (*o*).

Such communication need only be made when an answer can be obtained from the cargo owners, or there is reasonable expectation that it can be obtained, before it becomes necessary to take action. If there are reasonable grounds for such an expectation, the master should use every means in his power to obtain such an answer. He is bound to employ the

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(*j*) As in the case of jettison resulting from improper stowage on deck: *Newall* v. *Royal Exchange S. Co.* (1885), 33 W. R. 342, 868.

(*k*) As in cases of transhipment, in which the captain does not abandon the shipowner's voyage, and forward the goods in the interests of the cargo owner, but continues the voyage in another ship in the interests of the shipowner and to earn freight for him.

(*l*) *Newall* v. *Royal Exchange S. Co.*, *vide supra.*

(*m*) Such communication is practically impossible in the cases of jettison and salvage agreements at sea.

(*n*) *The Hamburg* (1863), 2 Moore, P. C., N. S. at p. 323, explaining *The Bonaparte* (1853), 8 Moore, P. C. 459.

(*o*) *The Karnak* (1869), L. R. 2 P. C. at p. 513; *The Onward* (1873), L. R. 4 Adm. 38.

telegraph where it can be usefully employed, but the state and management of the particular telegraph, and the probability of correct transmission of messages by it are all to be considered (*p*).

The information furnished must be full, and must include a statement of any measures, such as sale, raising money on bottomry, &c., which the master proposes to take (*q*).

If the master communicates and receives instructions, he is bound to follow them, if consistent with his duty to the shipowner; if he communicates and receives no instructions he may take such action as appears necessary (*r*); if he can communicate and does not do so, he cannot justifiably take any action on behalf of the cargo owners (*s*).

Case 1.—A vessel belonging to Hamburg, during her voyage from South America to London with a cargo belonging to English owners, but not perishable, put into St. Thomas to repair. Mails left St. Thomas for London every fortnight, taking fourteen days on the journey. The master made no attempt to communicate with the consignees, but three months after arrival gave a bottomry bond on ship, freight and cargo for the cost of repairs. *Held*, that the bond was invalid against the cargo owners, as the master had not consulted them, though he had reasonable opportunities of so doing (*s*).

Case 2.—A timber laden vessel bound to England put into the Mauritius for repairs on June 11. The master placed the ship in the hands of Messrs. B., who, without attempting to raise money on the personal credit of the shipowners, proposed a bottomry bond on ship, freight and cargo. On July 29, the master communicated this proposal to shipowners, and communicated the need of repairs, but not the bottomry, to the cargo owners, who did not hear of the proposal till September 8, too late to prevent the proposal being carried into effect. *Held*, the bond was invalid against the cargo, both because there was no necessity for it, the cargo not being a perishable one, and because the master had failed to communicate with the cargo owners (*t*).

Case 3.—Wool was shipped from X. to Z., forty-five miles from X. The ship was wrecked, the cargo transhipped and brought back to X. It was there found damaged by transhipment, dirty, and wet, and it began to heat. Lloyd's agent, on Saturday, December 23, advised an immediate sale, which was fixed for Tuesday, December 26. There were twenty-three owners of the wool, most of them at Z., 900 miles from X.; no letter could reach them in time; there was a telegraph, but owing to the intervention of Sunday and Christmas Day, and the mercantile habits of Z. the jury found communication by telegraph impossible. *Held*, a case was made out entitling the master to sell (*u*).

(*p*) *Australasian S. Navigation Co.* v. *Morse* (1872), L. R. 4 P. C. 222.
(*q*) *The Onward*, *v.s.*; *Kleinwort* v. *Cassa Marittima* (1877), L. R. 2 App. C. 156.
(*r*) *The Karnak* (1869), L. R. 2 P. C. 505.
(*s*) *The Hamburg* (1863), 2 Moore, P. C., N. S., 289.
(*t*) *The Onward* (1873), L. R. 4 Adm. 38.
(*u*) *Australasian Steam Navigation Co.* v. *Morse* (1872), L. R. 4 P. C. 222.

Article 99.—Master's duty to proceed without deviation.

In the absence of express stipulation the owner of a vessel, whether a general ship or chartered for a special voyage, impliedly undertakes to proceed without unnecessary (*x*) deviation in the usual and customary manner (*y*).

Deviation necessary to save life will be allowed to the shipowner; deviation only necessary to save property will not be allowed (*z*).

To tow another vessel even in the course of the chartered voyage will constitute a breach of the implied contract; to communicate with a ship in distress will not, as the distress may involve danger to life (*z*).

The shipowner will be liable for any damage to the charterer or cargo owner, which occurs on or results from an unnecessary deviation (*a*).

Note.—Express stipulations limiting this implied contract are now usually introduced into charters and bill of lading, *e. g.*:—

"The owners reserve to themselves liberty for the steamer to sail with or without pilots, to tow and be towed, and to assist vessels in all situations: to proceed to the above port of destination, *viâ* any port or ports, in any order or rotation, and for any purpose, whether in or out of the advertised route, and to touch at any port or ports more than once without the same being considered a deviation, whatever may be the reason for calling at, or entering such port or ports;" or

"With liberty to call at any ports in any order, to sail without pilots, and to tow and assist vessels in distress, and to deviate for the purpose of saving life or property;" or

"With liberty to call at any ports on the way for coaling or other necessary purposes, to sail without pilots, and to tow and assist vessels in distress, and to deviate for the purpose of saving life."

And "liberty to tow and assist vessels in all situations." This latter clause will protect a ship in towing off a stranded vessel, though no life is in danger, and though the vessel towing

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(*x*) See *post*, Article 100.

(*y*) *Davis* v. *Garrett* (1830), 6 Bing. 716; *Scaramanga* v. *Stamp* (1880), 5 C. P. D. 295 (C.A.) See also *Max* v. *Roberts* (1810), 12 East, 89; *Ellis* v. *Turner* (1800), 8 T. R. 531. On the implied undertakings in the contract of affreightment, see Articles 28–30.

(*z*) *Scaramanga* v. *Stamp*, *vide supra*.

(*a*) *Davis* v. *Garrett*, *vide supra*; compare *Nevcall* v. *Royal Exchange S. Co.* (1885), 33 W. R. 342, 868.

is wrecked and her cargo lost: *Stuart* v. *British and African Navigation Co.* (*b*).

In that case the question was raised as to the extent to which this clause protected the shipowner in towing or deviating, but the Court professed themselves unable to give any answer. It is submitted that the same double undertaking will exist as in the case of *Jackson* v. *Union Marine Insurance Co.* (*c*); and the shipowner will not be allowed to undertake such deviations or towage as would frustrate the commercial purposes of the adventure.

Case 1.—A ship was chartered to convey lime from X. to Z. She unnecessarily deviated from the usual course, and during such deviation the lime suffered damage by rain. *Held*, that the charterer was entitled to recover such damage from the shipowner (*d*).

Case 2.—A ship was chartered to proceed from X. to Z.; on her voyage she went to the assistance of a vessel in distress, and agreed to tow her to Y. (out of her course); while thus towing she was wrecked. The jury found the deviation not reasonably necessary to save life, but reasonably necessary to save property. *Held*, that such a deviation was unjustifiable, and that the cargo-owners could recover against the shipowner (*e*).

Article 100.—*Master's authority to delay and deviate in cases of necessity.*

If a master receives credible information that if he continues in the direct course of his voyage his ship or its cargo will be exposed to some imminent peril, as by hostile capture, pirates, icebergs, or other dangers of navigation, he will be justified in reasonable delay to ascertain the nature of the danger, and reasonable delay or deviation to avoid it, or to consult his owners, if communication with them is possible (*f*). It is not necessary that the danger should be common to ship and cargo: it will be sufficient if it affects either of them (*g*).

(*b*) (1875), 32 L. T. 257.
(*c*) (1874), L. R. 10 C. P. 125, and see Article 30.
(*d*) *Davis* v. *Garrett* (1830), 6 Bing. 716.
(*e*) *Scaramanga* v. *Stamp* (1880), L. R. 5 C. P. D. 295.
(*f*) *The Teutonia* (1872), L. R. 4 P. C. 171, at p. 179; *The San Roman* (1873), L. R. 5 P. C. 301; *The Wilhelm Schmidt* (1871), 25 L. T. 34; *The Express* (1872), 3 L. R. Adm. 597; *The Heinrich* (1871), 3 L. R. Adm. 424; *Pole* v. *Cetcovitch* (1860), 9 C. B., N. S. 430. Where the danger was foreseen by the shipowner, who after consideration gave his master orders to pursue a certain course, the master has no power to deviate from that course in consequence of that danger: *The Roebuck* (1874), 31 L. T. 274.
(*g*) *The Teutonia*, *vide supra*.

If the master delays or deviates unreasonably, or to a greater extent than a prudent man under the circumstances would adopt, the cargo-owner's position depends on whether the delay is so unreasonable as to put an end to the contract from a commercial point of view. If it is, the goods owner will be justified in requiring his goods at the port of delay without payment of any freight (*h*); if it is unreasonable, but not so much so as from a commercial point of view to put an end to the contract, the cargo-owner's remedy will be an action for damages (*i*).

If the delay or deviation is reasonable, the charterer cannot require the goods short of the port of destination, without the payment of full freight (*k*).

Case 1.—A Prussian ship with a contraband cargo was chartered from X. to an English port for orders; thence to any safe port in England or the continent between Havre and Hamburg; she received orders to proceed to Dunkirk, and had arrived off that port on June 16, when she was informed that war had broken out between France and Prussia. The captain sailed to the Downs to inquire, and anchored there on June 17 (Sunday); on the 18th the shipowner ordered him not to go into Dunkirk; on the 19th he put into Dover, and there was informed that war between France and Prussia, imminent from the 10th of June, had been declared on the 19th. *Held*, that putting back to the Downs to obtain information, and the delay till the 19th were justifiable, and that the goods owners could not obtain their goods at Dover, without payment of full freight (*l*).

Case 2.—Coffee was shipped on a German ship, under a bill of lading, containing only an exception of perils of the seas, from America to Hamburg. Near Falmouth the master was informed that war had broken out between France and Germany, and he accordingly put in to F. on August 23. Hamburg was then blockaded by the French fleet, and remained blockaded till September 18. During all that time and until November 7, the English Channel and North Sea were rendered unsafe by French cruisers. On September 18, when the blockade was raised, the goods owner offered full freight for the goods delivered either at F. or

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(*h*) See, however, *The Patria* (1871), L. R. 3 Adm. 436, at p. 464, on which see note (*m*), *post*: *per contra*, see *Castel* v. *Trechmann* (1884), 1 C. & E. 276.

(*i*) See Articles 28, 30.

(*k*) *The Teutonia*, *vide supra*.

(*l*) *The Teutonia* (1872), L. R. 4 P. C. 171. *The San Roman*, *The Heinrich*, *The Express*, and *The Wilhelm Schmidt*, *vide supra*., all arose out of similar circumstances, and in effect decide that reasonable apprehension of capture justifies delay or deviation. The latter part of the decision in the *Teutonia* can be supported either on the ground in the judgment, that the master was entitled to delay for a reasonable time by fear of capture, and could not be required to abandon his voyage without the payment of full freight; or on the ground that as the charterers had not named a port which could safely be entered, the fulfilment of the voyage was prevented by their failure to name a "safe port," and therefore the master was entitled to full freight. See *post*, Article 139.

at Hamburg. The master refused to proceed to Hamburg, on the ground of the danger of capture, and refused to deliver the cargo. *Held*, that the master's delay, (of fifty days, September 18 to November 7), was unreasonable, and his refusal to either proceed to H. or deliver the cargo, a breach of the contract (*m*); and that the goods owners were therefore entitled to the cargo.

Article 101.—*Master's duty to take care of Goods.*

The master, as representing the shipowner, has the duty of taking reasonable care of the goods entrusted to him, in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, *e.g.*, by ventilation, pumping, or saving goods which accident has exposed to danger (*n*).

He has also the duty of taking reasonable measures to prevent the loss or deterioration of the goods by reason of accidents, for the necessary effects of which the shipowner is by reason of the bill of lading under no liability, and the shipowner will be liable (*o*) for any neglect of such duty by the master (*n*).

The place, the season, the extent of the deterioration, the opportunities at hand, the interests of other persons in the adventure whom it might be unfair to delay for the sake of

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(*m*) *The Patria* (1871), L. R. 3 Adm. 436. It is difficult to understand this case, as the same judge had held a longer delay from similar causes reasonable in other cases: (*e.g.*, *San Roman*, 53 days; *Express*, 170 days). The absence of the exception, "restraint of princes," cannot make the difference, as, in *Atkinson* v. *Ritchie* (1809), 10 East, 530, that had been held to apply only to actual capture and not to apprehension of capture. It may be, though it is not so stated, that the delay put an end commercially to the contract; or the case may be rested on the ground that the goods owner was entitled to demand his goods on tender of full freight, which however would not prove that he was entitled to them without any payment of freight on the ground of unreasonable delay. Sir R. Phillimore suggested that on the refusal of the master to proceed to H. the goods owners were entitled to their goods on payment of a *pro ratâ* freight, but it seems clear that such a refusal if wrongful would entitle them to their goods without payment of any freight at all. *Medeiros* v. *Hill* (1832), 8 Bing. 231, shows that, if the parties knew of the blockade when the charter was entered into, the existence of the blockade would be no defence to an action for not proceeding towards the blockaded ports.

(*n*) *Notara* v. *Henderson* (1872), L. R. 5 Q. B. 346; 7 Q. B. 225, *per* Willes, J., at p. 235; *Tronson* v. *Dent* (1853), 8 Moore P. C. 419; *Australasian Navigation Co.* v. *Morse* (1872), L. R. 4 P. C. 222.

(*o*) This is not like the authority to tranship, a power for the benefit of the shipowner only, to secure his freight: *De Cuadra* v. *Swann* (1864), 16 C. B. N. S. 772.

that part of the cargo in peril, all the circumstances affecting risk, trouble, delay, and inconvenience must be taken into account. The performance of the duty cannot be insisted on if it involves deviation, but reasonable delays in a port of call for purposes connected with the voyage, though not necessary to its completion, will not amount to deviation (*p*).

As the master has to exercise a discretionary power his owner will not be liable, unless it is affirmatively proved that the master has been guilty of a breach of duty (*p*).

Semble. The master will have a lien on the goods for any expenses incurred in the performance of such duty (*q*).

Case 1.—F. shipped beans on the *S.* on a voyage on Z., the bill of lading giving leave to call at ports on the voyage. The vessel stopped at Y., and on her way out came into collision, whereby the beans were damaged by salt water: she put back to Y. The wet beans might have been warehoused and dried at Y., with material benefit to them, and without unreasonable delay to the adventure. The ship proceeded to Z. without drying them. *Held*, that the shipowners were liable to F. for the master's failure to dry the beans (*r*).

Article 102.—*Master's power to sell damaged Goods.*

The condition of the goods may be such that immediate sale is the wisest course in the interests of the cargo owner; in such a case the master, if he cannot communicate with the cargo owner and receive his instructions, will be bound to sell them (*s*). Such a condition will arise if the master cannot convey the goods or cause them to be conveyed to their destination as merchantable articles, either at all, or without an expenditure clearly exceeding their value after their arrival at their destination (*t*).

(*p*) See note (*n*) *ante*, p. 180.

(*q*) *Hingston* v. *Wendt* (1876), L. R. 1 Q. B. D. 367. See *per* Blackburn, J., at p. 373.

(*r*) *Notara* v. *Henderson* (1872), L. R. 7 Q. B. 225.

(*s*) *Australasian S. Nav. Co.* v. *Morse* (1872), L. R. 4 P. C. 222; *Acatos* v. *Burns* (1878), L. R. 3 Ex. D. 282; *Tronson* v. *Dent* (1853), 8 Moore P. C. 419, 448, *et seq.*; *Atlantic Insurance Co.* v. *Huth* (1880), L. R. 16 Ch. D. 474; *Vlierboom* v. *Chapman* (1844), 13 M. & W. 230, and see Articles 97, 98.

(*t*) *Atlantic Insurance Co.* v. *Huth* (1880), *v. s.* at p. 481. As to person liable for unjustifiable sale by master, see *Wagstaff* v. *Anderson* (1879), L. R. 4 C. P. D 283, *et* Articles 2, 93.

Case 1.—Maize was shipped on a voyage from X. to Z.: at Y., an intermediate port, it was found heated and sprouting; the master transhipped it into lighters; and informed the shipper's agent by telegraph on March 10 and 13 of its condition, suggesting that it could not be carried on. He received two telegrams in reply that the shipper wished the grain to be forwarded. On March 27 the captain telegraphed again: "Have held survey, which reports grain unfit for shipment; will be sold to-morrow by public auction;" and it was sold on the 28th. The sale was a prudent measure, but not one of such urgent necessity as to give no time or opportunity for communicating with the owners. *Held*, that no case was made out entitling the master to sell, as he was bound to have waited the result of his communication of the proposed sale to the owner (*t*).

Case 2.—The ship *R.*, with a mixed cargo of metal and perishable articles, was wrecked on April 19, in Algoa Bay, fifty miles from Port Elizabeth. The consul there on April 22, advised the captain to sell the ship and cargo, which he did on April 30. The captain did not go to P. E., or make any attempt to raise money for salvage, or to induce others to attempt the salvage. He had no funds in his hands. There was conflicting evidence as to whether such attempts, if made, would have been successful, but much evidence that the course adopted was the most prudent. *Held*, that no necessity for the sale existed, such as would make the master the agent of the cargo owner to effect a sale, and that the sale must therefore be rescinded (*u*).

Article 103.—*Master's power of Transhipment.*

If an English vessel (*x*) in which goods are shipped is hindered from completing the contract voyage, the shipowner is not bound either to repair or tranship; though if he elects to do neither, he must hand over his cargo to the cargo owner (*z*) freight free, or if the cargo owner is not present to receive it, the master must act for the best, and as the cargo owner's agent, unless he can consult him. He has, however, the right to earn his freight either by repairing his own ship and proceeding to the port of destination, or by transhipping the goods into another vessel to be

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(*t*) *Acatos* v. *Burns* (1878), L. R. 3 Ex. D. 282. See also *Australasian S. Nav. Co.* v. *Morse* (1872), L. R. 4 P. C. 222, cited *ante*, Article 98, Case 3, p. 176.

(*u*) *Atlantic Insurance Co.* v. *Huth* (1880), 16 Ch. D. 474. The sale was rescinded as invalid by the law of the country where it was made; if it had been valid by that law, though invalid by English law, it could not have been rescinded, though the captain would be responsible to the owners of the cargo for an improper sale: *Cammell* v. *Sewell* (1860), 5 H. & N. 728, p. 176.

(*x*) See Article 7; *The Bahia* (1864), B. & L. 292; *The Express* (1872), 3 L. R. Adm. 597.

(*z*) See *per* Bowen, L.J., in *Svendsen* v. *Wallace* (1884), 13 Q. B. D., at p. 88.

forwarded thither (*a*), and he may delay the transit a reasonable time for either of these purposes (*b*).

In case of justifiable transhipment by the master as agent for the shipowner, the cargo owner will be bound to pay the full freight originally contracted for, though the transhipment was effected by the shipowner at a smaller freight (*c*).

Semble, that the master cannot, without express authority, bind the cargo owner to pay a larger freight than that originally contracted for, unless communication with the cargo owner was impossible, and forwarding the cargo at such a freight would appear to a reasonable man to be the most beneficial course in the interests of the cargo (*d*).

If the hindrance of the ship's voyage is not caused by excepted perils, the shipowner is not entitled as of right to tranship on his own account, (though he may be bound to do so on account of the cargo owner); but he is liable for delay or failure to deliver (*e*).

Case 1.—F. shipped goods on board the *S.* at a named freight for a voyage from X. to Z.: on the voyage, at Y. the necessity for transhipment arose, and the master made a contract for the forwarding of the goods to Z. at a freight, which, together with *pro rata* freight from X. to Y., was less than the original freight agreed upon. On arrival at Z., F. refused to pay more than such *pro rata* and forwarding freight. *Held*, that he was bound to pay the freight originally agreed upon (*e*).

Note.—Full powers as to transhipment are usually given in the bill of lading, *e.g.*:—"The owners reserve to themselves liberty to tranship, or land and reship by lighter or otherwise at ship's expense and shipper's risk, the goods in this bill of lading, at the port of shipment, or any other port or ports, into any other vessel or vessels belonging to themselves or other persons, pro-

(*a*) See *per* Lawrence, J., in *Cook* v. *Jennings* (1797), 7 T. R. 381, at p. 385, and *per* Lindley, J., in *Hill* v. *Wilson* (1879), L. R. 4 C. P. D. 329, at p. 333; *De Cuadra* v. *Swann* (1864), 16 C. B., N. S. 772.

(*b*) *The Bahia, v. s.*; *The Soblomsten* (1866), L. R. 1 Adm. 293; *Cargo ex Galam* (1863), B. & L. 167; *The Gratitudine* (1801), 3 C. Rob. 240; *Shipton* v. *Thornton* (1838), 1 P. & D. 216, 231, *et seq.*

(*c*) *Shipton* v. *Thornton*, *vide supra*.

(*d*) *Gibbs* v. *Grey* (1857), 2 H. & N. 22, where it was held that the master had no power to bind the consignee to ship a full cargo, or *semble*, to pay a higher freight than that current at the time; and see *Cargo ex Argos* (1873), L. R. 5 P. C. 134, at p. 165; *Shipton* v. *Thornton*, *vide supra*, at p. 234.

(*e*) *Shipton* v. *Thornton* (1838), 1 P. & D. 216. See *Matthews* v. *Gibbs* (1860), 30 L. J. Q. B. 55.

ceeding either directly or indirectly to port of destination; nor will they be responsible for any detention which may be caused thereby;" or

"The company are to be at liberty to carry the goods to their port of destination by the above or other steamer, or steamers, ship or ships, either belonging to the company or to other persons, proceeding either directly or indirectly to such port, and in so doing to carry the goods beyond their port of destination, and to tranship or land and store the goods either on shore or afloat, and reship and forward the same at the company's expense, not at merchants' risk;" or,

"The owners reserve liberty to overcarry and tranship, or land and reship at any port into any other vessel at merchants' risk, but at steamer's expense (*f*), for conveyance to destination, any goods which from any cause whatever may not have been landed during vessel's stay at port of destination;" or,

"In case the whole or any part of the goods specified herein be prevented from any cause from going in any one steamer, the shipowner is only bound to forward them by first succeeding steamer of same line."

Article 104.—*Master's power of raising Money on Cargo.*

The master will be entitled to raise money on the cargo, to enable him to complete the contract voyage, if such course is the most beneficial for the cargo owner, when the master cannot obtain money in any other way, and if the cargo owner cannot be communicated with, or being communicated with, omits to give any instructions whatever.

Money may be so raised either: (1.) by a sale of part of the cargo (*g*); in which case the goods owner may either treat the proceeds of the sale as a loan to the shipowner; or, if the vessel reaches her destination, he may claim an indemnity against any loss occasioned to him by the sale, but in the latter case he must pay the freight which would have been earned if the goods sold had been carried to their destination (*g*): (see Article 143 on Freight.) (2.) By a loan on the special security of the cargo, analogous to a bottomry bond (*h*).

(*f*) Sometimes this runs "at merchant's risk and expense."

(*g*) See *Hopper* v. *Burness* (1876), L. R. 1 C. P. D. 137, and Articles 97, 98.

(*h*) This contract is sometimes known as *respondentia*, on which, see *Busk* v. *Fearon* (1803), 4 East, 319; *Glover* v. *Black* (1763), 3 Burr. 1394; *The Sultan* (1859), Swabey, 504.

Article 105.—*Bottomry.*

By English law (*i*) the master as agent of the cargo owner has authority to bind the cargo by a bottomry bond as security for advances made to him, when such advances are necessary in the interests of the cargo (*k*), and when it is either impossible to communicate with the cargo owner and receive his instructions within such a time as will afford any reasonable prospect of success in protecting the cargo (*l*), or when, a proper communication (*m*) of the necessity of raising money by bottomry having been made to the cargo owner, he has omitted to send any instructions to the master (*n*).

It is essential to a bottomry bond that there should be a maritime risk involved, *i.e.*, that the money advanced should only be payable if the ship or cargo arrives safely at its destination (*o*); and that it should not be merely an advance on the personal credit of the master, goods owner, or shipowner (*p*).

(*i*) The law by which the powers of the master to bind ship and cargo by a bottomry bond are to be determined, is, in the absence of express evidence of contrary intention, the law of the ship's flag. See Article 7.

(*k*) *The Hamburg* (1864), 2 Moore, P. C., N. S. 289; *The Karnak* (1869), L. R. 2 P. C. 505; *The Onward* (1873), L. R. 4 A. & E. 38, at p. 58; *The Gratitudine* (1801), 3 C. Rob. 240; *The Faithful* (1862), 31 L. J. Adm. 81; *Wallace* v. *Fielden* (1851), 7 Moore P. C. 398. When the master has bound the cargo without authority, the cargo owner can recover from the shipowner any sums he has had to pay to obtain the cargo, on an implied contract of indemnity: *Benson* v. *Duncan* (1849), 3 Ex. 644, and see Article 97.

(*l*) *The Onward, v.s.; The Bonaparte* (1853), 8 Moore P. C. 459; *The Hamburgh, v.s.; The Olivier* (1862), Lush. 484; *The Lizzie* (1868), 2 L. R. Adm. 254; *The Panama* (1870), 3 L. R. P. C. 199.

(*m*) As to what is a proper communication: see *Kleinwort* v. *Cassa Marittima of Genoa* (1877), L. R. 2 App. C. 156; *The Onward, v.s.; The Bonaparte, v.s.*, and Article 98.

(*n*) *The Bonaparte, vide supra.*

(*o*) *The Indomitable* (1859), Swabey, 446; *Stainbank* v. *Shepard* (1853), 13 C. B. 418; *The Heinrich Bjorn* (1885), 10 P. D. 44 (C.A.). Nothing can be hypothecated, except something which is in danger of perishing by maritime risk during the time the bond is running. Therefore, cargo not yet shipped cannot be pledged. *The Jonathan Goodhue* (1858), Swabey, 355. Nor can cargo which having been shipped in another ship has been burnt: *The Sultan* (1859), Swabey, 504. If part of the cargo is lost on the voyage, the owners of the cargo will be freed from a proportionate part of the sum secured by the bond: *The Sultan, vide supra.* Freight to be earned on a subsequent voyage is not the subject of bottomry: *The Staffordshire* (1872), L. R. 4 P. C. 194.

(*p*) *Busk* v. *Fearon* (1803), 4 East, 319; *The Heinrich Bjorn, vide supra.* The fact that bills are given as a collateral security does not necessarily invalidate the bond: *The Onward, vide supra*; *The Staffordshire, vide supra.*

Case.—A., owner of the ship *R.*, lying at X., gave B. the following document: "In consideration of N. advancing me, A., £600 for necessaries supplied to the ship *H. B.*, I undertake to return them the whole amount so advanced me with interest and charges on the return of the *R.* from her present voyage. B. is also authorised to cover the said amount advanced me by insurance on ship out and home at my cost." *Held*, that this was not a bottomry bond, as there was no maritime risk, but an alternative security for the lender, viz., either the personal liability of A. if the ship returned, or the policy of insurance if she was lost (*q*).

Article 106.—*Conditions justifying Bottomry.*

Whether there is necessity for raising money on the cargo by bottomry must depend on whether any arrangement more beneficial to the cargo than by raising money on it to enable the voyage to be prosecuted, can be made (*r*). The foundation of the master's authority to bind the cargo is the prospect that such a course will be the one most beneficial to the cargo owner (*s*). Thus if the master could obtain money on his personal credit, or that of the shipowner (*t*), or if there is an agent of the shipowner within reach, whom he has not consulted (*u*), his authority to bind the cargo by bottomry will not arise. The question will not only be, was there a necessity for bottomry at all, but was there a necessity for a bond for that amount; and it will not avail the bondholder to say he made reasonable inquiries if the amount expended is in fact unnecessary and unreasonable (*x*).

(*q*) *The Heinrich Bjorn, vide supra.*

(*r*) *The Karnak* (1869), L. R. 2 P. C. 505. The money may be raised to free the cargo from arrest for salvage: *The Sultan* (1859), Swabey, 504.

(*s*) *The Onward*, L. R. 4 A. & E. 38.

(*t*) *Soares* v. *Rahn* (1838), 3 Moore, P. C. 1; *Heathorn* v. *Darling* (1836), 1 Moore P. C. 5. The fact that money was advanced before the bond was given is immaterial if the money was advanced in view of a bond being given: *The Laurel* (1863), B. & L. 191.

(*u*) *Lyall* v. *Hicks* (1860), 27 Beav. 616; *The Faithful* (1862), 31 L. J. Adm. 81. But an advance by agents of the shipowner on bottomry is not invalid, if they refused to advance on his personal credit, and gave the master a chance of getting money elsewhere: *The Hero* (1817), 2 Dod. at p. 144; *The Staffordshire* (1872), L. R. 4 P. C. at p. 203.

(*x*) *The Pontida* (1884), L. R. 9 P. D. 177. As to various items for which bottomry may be justified: see *The Glenmanna* (1860), Lush, 115; *The Edmond* (1861), Lush, 211.

Where communication with the cargo owner is reasonably practicable, the master must lay the facts before him, and ask his instructions as to bottomry before acting. It is not sufficient merely to state the injuries to the ship, and the need of repairs or other steps in the interests of the cargo, without a statement of the necessity of raising money by bottomry (*y*). If the cargo owners ask for further information the master has no right to act until he has supplied such further information, if such further information should have been supplied at first (*z*).

Article 107.—*Jettison.*

The captain's authority to jettison goods properly stowed arises in cases of necessity (*a*), *i.e.* where a prudent man in the interests of the adventure would take such a course (*b*).

Where such necessity arises the captain in making the jettison acts as agent of the cargo owner (*b*); if no such necessity exists, or if the goods jettisoned were improperly stowed, *e.g.* on deck, and the jettison is therefore improper, the captain acts only as the agent of the shipowner, who is liable for his acts (*c*) unless protected by exceptions (*d*).

Article 108.—*General Average.*

All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of

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(*y*) *Wallace* v. *Fielden* (1851), 7 Moore, P. C. 398; *The Onward*, *vide supra*.

(*z*) *Kleinwort* v. *Cassa Marittima* (1877), L. R. 2 App. C. 156.

(*a*) It is almost impossible that the question of communicating with the cargo owner should arise, except perhaps in a case of stranding.

(*b*) *Burton* v. *English* (1883), 12 Q. B. D. 218, at pp. 220, 223; and see Article 97.

(*c*) *Newall* v. *Royal Exchange Steamship Co.* (1885), 33 W. R. 342, 868; now under appeal to H. L.

(*d*) *E.g.*, "at merchant's risk": *Burton* v. *English*, *vide supra*, and perhaps "negligence of master in navigating, &c." See Articles 90, 110.

the ship and cargo comes within general average, and must be borne proportionally by all who are interested (*e*).

To give rise to a claim for general average contribution (*f*):

1. There must be a common danger (*g*).
2. There must be a necessity for a sacrifice (*f*).
3. The sacrifice must be voluntary (*h*).
4. It must be a real sacrifice, and not a mere destruction and casting off of that which had become already lost (*h*), and consequently of no value.
5. There must be a saving of the imperilled property through the sacrifice (*f*).
6. The common danger must not arise through the default of the interest claiming a general average contribution (*f*).

Note.—Except in the case of express clauses, such as "the master, owner or agents of the vessel shall not be responsible either as carriers, *or as contributors to general average* for any loss or injury to the said goods, arising from any of the causes above-mentioned," which is so unreasonable as to require a very prominent place in the bill of lading to make it binding on the shipper (*i*), the bill of lading does not affect general average. The office of the bill of lading is to provide for the rights and liabilities of the parties in reference to the contract to carry, and it is not concerned with liabilities to contribution in general average where a loss has been occasioned by a sacrifice properly made for the general benefit (*k*).

The clause "not to be liable for any damage capable of being covered by insurance" does not free the shipowner from liability to general average contributions" (*k*).

(*e*) *Per* Laurence, J., in *Birkley* v. *Presgrave* (1801), 1 East, 220, at p. 228; see also *per* Brett, M.R., in *Svendsen* v. *Wallace* (1884), 13 Q. B. D. at p. 73. As to the etymology and history of the word "average;" see Murray's Dictionary, *sub voce*. The subject of general average is so entirely in the hands of average adjusters, and so ably dealt with in the works of Mr. Lowndes and Mr. Manley Hopkins, that I have not thought it necessary to treat it in any length or detail.

(*f*) *Pirie* v. *Middle Dock Co.* (1881), 44 L. T. 426.

(*g*) See *Walthew* v. *Mavrojani* (1870), L. R. 5 Ex. 116.

(*h*) *Shepherd* v. *Kottgen* (1877), L. R. 2 C. P. D. 585.

(*i*) *Crooks* v. *Allan* (1879), L. R. 5 Q. B. D. 38.

(*k*) *Per* Lush, J., in *Schmidt* v. *Royal Mail S.S. Co.* (1876), 45 L. J. Q. B., 646.

Article 109.—*Classes of General Average Loss.*

The following sacrifices or expenses may give rise to a claim for a general average contribution.

I. Sacrifices—1. Of cargo.
   (*a.*) By jettison.
   (*b.*) By fire, directly or indirectly.
   (*c.*) By sale.
   2. Of ship or tackle.
   3. Of freight.

II. Expenditure on ship in replacing a general average loss, or in a port of refuge.

Article 110.—*Jettison of Cargo.*

Where cargo stowed in a proper part of the ship is properly jettisoned for the common good its owner is entitled to a general average contribution from the other interests in the adventure; *i.e.*, the ship, the freight, and the rest of the cargo (*i*).

Cargo stowed on deck (which is not a usual or proper place of stowage), if jettisoned, does not give rise to a general average contribution from the other interests in the adventure, unless it is so stowed in pursuance of a recognised custom of the trade or port (*k*).

If the cargo is shipped on deck by agreement of the shipowner, and in the absence of a custom so to load, the owner of such cargo, if jettisoned, has no right to a general average contribution either against other cargo owners, or against the shipowner and person entitled to the freight, if there are other cargo owners (*l*); such a jettison may give rise

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(*i*) See Articles 90, 108, *supra*: as to the amount of the contribution, see *Fletcher* v. *Alexander* (1868), L. R. 3 C. P. 375.

(*k*) *Wright* v. *Marwood* (1881), L. R. 7 Q. B. D. 62, at p. 67. Such a custom was proved in *Burton* v. *English* (1883), 12 Q. B. D. 218 (C.A.), and in *Gould* v. *Oliver* (1837), 4 Bing. N. C. 134: it also exists in the coasting trade; it was not proved in *Newall* v. *Exchange Shipping Co.* (1885), 33 W. R. 342, 868.

(*l*) *Wright* v. *Marwood, vide supra;* not so, if there is a custom so to load: *Gould* v. *Oliver, vide supra.*

to such a contribution from the ship and freight, if there are no other cargo owners (*m*), even though such cargo according to the charter is to be carried "at merchant's risk" (*n*).

The clause "at merchant's risk" covers liability for improper jettison, resulting from acts of the crew done as the servants of the shipowner; but not for a proper jettison, which is made by the captain as agent of the cargo owner (*n*). If the goods are stowed on deck without the merchant's consent, or a binding custom so to stow, and are then jettisoned, the shipowner will be liable for such jettison as a breach of his contract to carry safely (*o*).

Case 1.—F. shipped in A.'s ship, twenty-six pieces of timber. There was a custom in the timber trade to carry lumber on deck. F.'s goods were placed on deck, and were properly jettisoned. *Held*, that F. was entitled to a general average contribution from ship and freight: *Semble*, also from cargo (*p*).

Case 2.– C. F. shipped in A.'s ship a full cargo of timber, under a charter, whereby C. F. was to provide "a full cargo of timber, including a deck load." On the voyage the timber on deck was properly jettisoned. *Held*, C. F. was entitled to recover a contribution to his loss from A. (*q*).

Case 3.—F. shipped cattle on A.'s ship, agreeing they should be carried on deck; there were other owners of cargo. On the voyage the cattle were properly jettisoned. *Held*, that F. was not entitled to a general average contribution either against A. or against the other cargo owners (*r*).

Case 4.—F. shipped timber on A.'s ship, which was not a general ship, under a charter "the steamer shall be provided with a deck-load if required at full freight, but at merchant's risk." There was a custom to carry such timber on deck: on the voyage the deck timber was properly jettisoned. *Held*, that F. was entitled to a general average contribution from A. (*s*).

Case 5.—Cotton was shipped by F., under bills of lading, excepting "jettison" and "stranding." Some of the cotton was stowed on deck; the ship stranded, and the deck cotton was properly jettisoned. An attempt to prove a custom to stow on deck failed. *Held*, that the cargo-owner was entitled to recover the full value of the cotton from the shipowner (*t*).

(*m*) *Johnson* v. *Chapman* (1865), 19 C. B., N. S. 563; discussed in *Wright* v. *Marwood* (1881), 7 Q. B. D. at p. 69.

(*n*) *Burton* v. *English*, *vide supra*; and see Articles 95, 107.

(*o*) *Newall* v. *Royal Exchange Steamship Co.* (1885), 33 W. R. 868; see also *per* Lush, L. J., in *Schmidt* v. *Royal Mail Co.* (1876), 45 L. J., Q. B. 646, at p. 648.

(*p*) *Gould* v. *Oliver* (1837), 4 Bing. N. C. 134.

(*q*) *Johnson* v. *Chapman* (1865), 19 C. B., N. S. 563.

(*r*) *Wright* v. *Marwood* (1881), L. R. 7 Q. B. D. 62.

(*s*) *Burton* v. *English* (1883), 12 Q. B. D. 218.

(*t*) *Newall* v. *Royal Exchange Steamship Co.* (1885), 33 W. R. 868: now under appeal to the H. L.

Article 111.—*Cargo damaged by Fire, directly or indirectly.*

Damage to the cargo by pouring water on it, or by scuttling the ship, to extinguish fire, or by burning it instead of fuel for the engines to avert the loss of ship and cargo (*u*), gives rise to a claim for general average contribution by the owner of the cargo destroyed or damaged (*x*).

Case.—F. had shipped wire on board the *S.* to be carried to Z. The *S.* arrived, and proceeded to discharge her cargo; about 100 tons remained on board, including the plaintiff's wire, when a fire broke out, which was extinguished by pouring water into the hold, whereby the wire was damaged. *Held*, that F. was entitled to a general average contribution from the owner of the *S.* (*x*).

Article 112.—*Sale of Cargo.*

Sale of part of the cargo to furnish money for repairs to enable the ship to prosecute the voyage (*z*), or to release the master from arrest that he may prosecute the voyage (*a*), will only give rise to a claim for general average against the rest of the cargo, if such cargo can be carried on in no other way, and it is more beneficial to the cargo to be carried on than to stay where it is (*z*): another kind of sale will only give rise to a personal claim against the shipowner (*b*).

Article 113.—*Sacrifice of Ship or Tackle.*

Sacrifice of ship or tackle necessary for the safety of the whole adventure, and not incurred in carrying out the ship-

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(*u*) *Semble*, that if the ship was insufficiently supplied with fuel at starting, the owner of the cargo burnt will be entitled to recover its full value from the shipowner, while in consequence other owners of cargo will not be liable to contribute to general average: *Robinson* v. *Price* (1876), L. R. 2 Q. B. D. 91, 295.

(*x*) *Whitecross Wire Co.* v. *Savill* (1882), L. R. 8 Q. B. D. 653; in which the Court of Appeal for the first time decided this question, which they had left undecided in *Stewart* v. *West India SS. Co.* (1873), L. R. 8 Q. B. 362. See also *Achard* v. *Ring* (1874), 31 L. T. 647. An exception "fire on board" in the bill of lading will not relieve the owner for liability for general average contribution to the owner of goods damaged by water used in extinguishing such fire: *Schmidt* v. *Royal Mail SS. Co.* (1876), 45 L. J. Q. B. 646.

(*z*) *Hallett* v. *Wigram* (1850), 9 C. B. 580.

(*a*) *Dobson* v. *Wilson* (1813), 3 Camp. 480.

(*b*) *Hopper* v. *Burness* (1876), L. R. 1 C. P. D. 137; in which the payment of freight on cargo thus sold is discussed; and see Article 104, on master's power of raising money on cargo.

owner's original contract, will give rise to a general average contribution (*c*), unless—

(*a.*) The thing sacrificed was at the time in such a condition that it would have been certainly lost, even if the rest of the adventure was saved, as when a mast is cut away, which is either certain to go overboard, or has already gone overboard and is hanging as a wreck (*d*).—Or :—

(*b.*) The sacrifice was rendered necessary by the original default of the shipowner, as in providing a ship insufficiently equipped (*e*), in which case he must bear all the loss.

Case 1.—A ship sailed well equipped, having a donkey engine, and a sufficient supply of coal for all purposes other than pumping purposes; she met with heavy weather and leaked considerably; the donkey engine was used to pump, and it was only by this steam pumping that the leak was kept under; the coal ran short; and some of the spare spars and cargo were used for fuel. *Held*, that the sacrifice of the spars and cargo was a general average loss (*f*).

Case 2.—A seaworthy ship, fitted with a donkey engine and a sufficient supply of coal for ordinary purposes, sailed on a voyage. She met bad weather, and made some water, but not enough to create any risk, while the engines worked; the coal got low, and spare spars and wood were burnt with it to economize it; but some coal was obtained from a passing vessel; at the end of the voyage the engine broke down from overwork. *Held*, by all the Court, that the injury to the engine, and the second supply of coal did not give rise to general average contribution; the Court were equally divided as to whether the burnt spars and wood were a general average loss (*g*).

Case 3.—A sailing ship, with auxiliary screw, was damaged by perils of the sea, so that practically she had lost all power of sailing; instead of repairing her sailing gear she proceeded with her voyage under steam alone, at a very heavy expenditure in coals. *Held*, that such expenditure did not give rise to a general average contribution (*h*).

Case 4.—A ship met with a storm which caused part of the rigging to give way; the mainmast in consequence began to lurch, and was cut away by the captain's orders; if it had not been cut away, it would have gone overboard very shortly, at great risk to the ship. *Held*, that the cutting away of the mast, then practically worthless, did not give rise to a claim for general average contribution (*i*).

(*c*) *Birkley* v. *Presgrave* (1801), 1 East, 220; *Price* v. *Noble* (1811), 4 Taunt. 123; *Wilson* v. *Bank of Victoria* (1867), L. R. 2 Q. B. 203.

(*d*) *Shepherd* v. *Kottgen* (1877), L. R. 2 C. P. D. 585. See *Corry* v. *Coulthard* (1877), 2 C. P. D. at pp. 583, 584.

(*e*) See *Robinson* v. *Price* (1877), L. R. 2 Q. B. D. 91, at p. 95; *Wilson* v. *Bank of Victoria* (1867), L. R. 2 Q. B. 203.

(*f*) *Robinson* v. *Price*, *vide supra*, and at p. 295.

(*g*) *Harrison* v. *Bank of Australasia* (1872), L. R. 7 Ex. 39.

(*h*) *Wilson* v. *Bank of Victoria*, *vide supra*.

(*i*) *Shepherd* v. *Kottgen* (1877), L. R. 2 C. P. D. 585.

Article 114.—*Sacrifice of Freight.*

Sacrifice of freight by the shipowner, by an act whereby the cargo is preserved, gives rise to a general average contribution against the cargo (*k*).

Case.—F. shipped coal on A.'s ship to be carried to Z.; on the voyage the coal took fire by spontaneous combustion; the ship and cargo were in immediate danger of total destruction by fire; but by jettison of cargo, and pouring water on it, and discharging it at Y., the ship and a large portion of the cargo were saved from destruction. It was found impossible to carry the cargo to its destination, and it was accordingly sold at Y. By reason of such measures, the ship was prevented from earning her freight by delivery at Z. *Held*, that the shipowner was entitled to a general average contribution from the cargo on account of the freight thus lost.

Article 115.—*Extraordinary Expenditure by Shipowner.*

Extraordinary expenditure voluntarily incurred, or extraordinary loss of time and labour voluntarily accepted, may also give rise to a general average contribution, provided that in each case the sacrifice is made for the common safety in a time of danger (*l*).

Such general average contribution must cover not only the voluntary sacrifice, but also expenses directly caused by, or in consequence of, a voluntary sacrifice (*l*).

Thus when the cargo has been placed in safety, it will not be liable to contribute to expenses afterwards incurred by the shipowner for the purposes of earning his freight, as in getting off a stranded vessel (*m*), or making arrangements for the further carrying of the cargo in his own vessel, under circumstances when the cargo might have stayed where it was, or have been carried on by other vessels, with equal

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(*k*) *Pirie* v. *Middle Dock Co.* (1881), 44 L. T. 426. It was also held that the cargo was not entitled to general average contribution from the ship: (1) because the loss arose from vice in the cargo; (2) because there was really no loss, the cargo selling for more at Y. than it would have realized after paying freight at Z.

(*l*) *Per* Bowen, L.J., *Svendsen* v. *Wallace* (1884), L. R. 13 Q. B. D. at pp. 84, 85. See also *per* Lawrence, J., in *Birkley* v. *Presgrave* (1801), 1 East, 220.

(*m*) *Walthew* v. *Mavrojani* (1870), L. R. 5 Ex. 116; *Job* v. *Langton* (1856), 6 E. & B. 779.

advantage (*n*). But expenses incurred by the shipowner or his agents, as agents of the cargo owner or in the sole interests of the cargo, in forwarding or preserving the cargo must be borne by the cargo (*o*).

Article 116.—*Expenses in Port of Refuge.*

Where a ship on her voyage puts into a port of refuge to repair a general average sacrifice, such as cutting away a mast, the expenses of repairing the sacrifice, of warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage with other charges on the vessel on leaving port, are also the subject of general average (*p*).

Where a ship on her voyage, in consequence of damage not the subject of a general average contribution, such as springing a leak, puts into a port of refuge, and, in order to repair the ship, the cargo is necessarily landed, the expenses of reloading the cargo to enable the ship to prosecute her voyage are not the subject of a general average contribution from the cargo (*q*).

Semble, that in principle, the expenses of unloading the cargo will or will not be the subject of general average according as the cargo is not or is safe in the ship without removal (*r*).

Semble, that the expenses of warehousing the cargo are to be borne by the cargo (*q*).

(*n*) *Schuster* v. *Fletcher* (1878), L. R. 3 Q. B. D. 418.

(*o*) See *per* M. Smith, J., and Hannen, J., in *Walthew* v. *Mavrojani*, *v.s.* at pp. 125, 126. M. Smith, J., suggests the case of "perishable goods landed on a desert island in a distant and unfrequented part of the world." *Semble*, that this is not general average; but that the original adventure being at an end, the cargo-owner must bear the whole expense: see *Cargo ex Argos* (1872), L. R. 5 P. C. 134.

(*p*) *Atwood* v. *Sellar* (1880), L. R. 5 Q. B. D. 286. See also *Plummer* v. *Wildman* (1815), 3 M. & S. 482, as explained in *Svendsen* v. *Wallace* (1885), 13 Q. B. D. at p. 91; *Hallett* v. *Wigram* (1850), 9 C. B. 580.

(*q*) *Svendsen* v. *Wallace* (1885), L. R. 10 App. C. 404; 13 Q. B. D. 69. See also *Power* v. *Whitmore* (1815), 4 M. & S. 141; *Hallett* v. *Wigram*, *v.s.*; *Walthew* v. *Mavrojani* (1870), L. R. 5 Ex. 116.

(*r*) In practice they are charged as general average; but see Brett, M.R., 13 Q. B. D. at p. 76, Bowen, L.J., 13 Q. B. D. at p. 88; Lord Blackburn, 10 App. C. at p. 414.

Semble, that pilotage expenses and port dues out are not the subject of general average (*s*).

The expenses of unloading and reloading cargo at a port of refuge may be a general average charge on freight, to earn which they are incurred (*t*).

Note.—The distinction in fact between *Atwood* v. *Sellar* (*u*) and *Svendsen* v. *Wallace* (*v*), is that in the first case the ship put into port to repair a general average sacrifice; in the second to repair a particular average loss, or one liable to be borne by the ship alone (*w*); though such putting into port is probably a general average sacrifice in itself. The difference in principle is not clear, and seems to be rather a question of the continuity of the transaction, unloading the cargo not being a necessary consequence of putting into port, which was the general average sacrifice in *Svendsen* v. *Wallace;* though it is of the voluntary sacrifice of the ship, which was the general average act in *Atwood* v. *Sellar*. But it is impossible to feel that the present position of *Atwood* v. *Sellar* is satisfactory as an authority. *Da Costa* v. *Newnham* (*x*) must be taken as overruled: and *Moran* v. *Jones* (*y*) as either overruled or limited to its own very special facts (*z*).

Article 117.—*Master's duty to collect General Average Contribution.*

Where a general average loss has occurred on a voyage, the shipowner or master has the right to retain the cargo until he is paid or tendered the amount due on it for general average (*a*): he is under a duty to persons entitled to a general average contribution from the cargo so to do, and is liable to an action if he omits to do so (*b*).

(*s*) So *per* majority of C. A. in *Svendsen* v. *Wallace*, *vide supra*.
(*t*) *Hall* v. *Jansen* (1855), 4 E. & B. 500.
(*u*) See note (*p*) *ante*, p. 194.
(*v*) See note (*q*) *ante*, p. 194.
(*w*) *Jackson* v. *Charnock* (1800), 8 T. R. 509; *Hallett* v. *Wigram* (1850), 9 C. B. 580.
(*x*) (1788), 2 T. R. 407. See Brett, M.R., 13 Q. B. D. 80; Bowen, L.J., p. 90.
(*y*) (1857), 7 E. & B. 523. See *per* Brett, M.R., at p. 80; Bowen, L.J., at p. 93.
(*z*) The present practice of English average adjusters, will be found in the Resolutions of July 9, 1885, set out in Appendix IV.
(*a*) See *per* Lord Esher and Lindley, L.J., in *Huth* v. *Lamport* (1886), 16 Q. B. D. 735; *Simmonds* v. *White* (1824), 2 B. & C. 805, at p. 811.
(*b*) *Crooks* v. *Allan* (1879), L. R. 5 Q. B. D. 38; *Hallett* v. *Bousfield* (1811),

It is also the duty of the master to furnish to all cargo-owners all the accounts and particulars necessary for adjusting general average (*c*). If he omits to do so, the cargo-owner who fails to tender a sufficient sum in consequence of such omission, is not liable for such failure (*d*).

If he does furnish such particulars, the cargo-owner must either pay the sum demanded, or tender the right sum, at his peril (*d*).

If, as in practice, the master demands a particular security (*e*) for the payment by the cargo owner of the amount found on adjustment to be due, such security must be a reasonable one (*f*).

Case.—A., shipowners, had a lien on cargo in their ship, for general average. They required the cargo-owner to make a deposit of 10 per cent. on the value of the goods in the name of A., or B., his average adjuster, or A. and B.: and to execute a bond, the "Liverpool Bond," providing that such deposit should be a security for general average, and that the persons in whose name it stood might pay out from time to time such sums as they thought right to A. or his master on account of their disbursements. "All questions of general average to be adjusted by B., with appeal to arbitrators whose decision was final." *Held*, that such a requirement was unreasonable, and its continued demand released the cargo owner from the necessity of tendering (*f*).

Article 118.—*Who can sue for General Average Contribution.*

I. The shipowner, or the charterer, if the charter amounts to a demise: they have also a possessory lien on the cargo for the general average contribution due from it (*g*).

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18 Ves. 187, does not seem to have been cited, and is now of doubtful authority. Some bills of lading exempt the master from this duty, *e.g.*, "shipowner not to be bound to exercise his lien on cargo for general average contribution." The master is under no duty to persons entitled to salvage from the cargo to detain it, until he obtains a bond from the cargo owners to pay such salvage: *The Raisby* (1885), L. R. 10 P. D. 114, and Article 121.

(*c*) *Huth* v. *Lamport*, *vide supra*, and see *The Norway* (1864), B. & L. at p. 397.

(*d*) See *per* Lord Esher and Lindley, L.J., in *Huth* v. *Lamport* (1886), 16 Q. B. D. 735; *Simmonds* v. *White* (1824), 2 B. & C. 811.

(*e*) *Semble*, that if the master obtains from the cargo owners the form of security usual at the port of discharge, he will be protected: *Simmonds* v. *White* (1824), 2 B. & C. 805; *The Raisby* (1885), 10 P. D. 114.

(*f*) *Huth* v. *Lamport* (1886), 16 Q. B. D. 735. The clause in some bills of lading, "In case of average, a deposit sufficient to cover the estimated contribution to be paid at port of discharge if so required by the master," seems both unnecessary and unworkable. The master has his lien without it, and the method of "estimating," which is the difficulty, is not provided for.

(*g*) See Articles 117, 149.

II. The cargo owner, who can sue another cargo owner (*h*), the shipowner, or the person entitled to the freight, for general average contributions due from them. He has not after adjustment a maritime lien on the ship for the contribution due from it, nor will such a personal debt support a bottomry bond on the ship given in a subsequent voyage (*i*).

III. The person entitled to the freight, for contributions due from the other interests in the adventure (*j*).

Article 119.—*Who is liable for General Average Contribution.*

There are liable for general average contributions :—

I. The shipowner, for those due from the ship, (unless she is under a charter amounting to a demise, in which case the charterer is liable), and from the chartered freight.

II. The charterer for those due from the ship, if the charter amounts to a demise, and from freights payable to him.

III. The cargo owner.

IV. A consignee of cargo who has taken delivery of the goods under a bill of lading is not liable for general average, unless

(*a.*) he is the owner of the goods ;

or (*b.*) the bill of lading under which he takes the goods stipulates that he shall pay average ;

or (*c.*) he has notice from the master of his lien for average, and after that takes the goods (*k*).

Article 120.—*General Average Contribution, how adjusted.*

In the absence of special agreement (*l*), the amount to be contributed in general average is adjusted when the voyage

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(*h*) *Dobson* v. *Wilson* (1813), 3 Camp. 479.

(*i*) *The North Star* (1860), Lush. 45 : *quære*, whether a lien for general average by foreign law will support a bond.

(*j*) *Pirie* v. *Middle Dock Co.* (1881), 44 L. T. 426.

(*k*) *Scaife* v. *Tobin* (1832), 3 B. & Ad. 523. He would not be liable if he merely had notice that the goods were liable for general average, but not that the master claimed a lien : (*same case*).

(*l*) *E.g.* "Average, if any, to be adjusted according to British custom," which

is terminated by the delivery of the goods or otherwise, and according to the law of that place (*m*). The fact that the voyage has been temporarily suspended, while the ship is repaired at a port of refuge, does not justify an average adjustment at such port (*n*).

Article 121.—*Salvage.*

If cargo is saved from loss or damage on a voyage by persons other than those who have undertaken to carry it, the salvors are entitled to remuneration for their services, known as *salvage.*

No salvage is payable by cargo owners unless some cargo is saved, and it is payable proportionately to the cargo saved (*o*). Ship and cargo must each pay its own share of salvage; neither can be made liable for salvage due from the other without an express agreement to pay it (*p*); but either or both, if saved, may be liable to pay salvage for life saved, though if life is saved but not cargo, the cargo owner will not be liable to pay life salvage (*q*).

The authority of the master to bind the cargo to pay salvage is derived from necessity and benefit to the cargo (*r*). It is no part of the duty of the master of the salved ship to protect the salvors by obtaining a bond from the cargo-owners for their proportion of any salvage that may be due, before allowing the cargo owners to take away their goods (*s*).

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makes the custom of English average adjusters, though contrary to the law, part of the contract, *Stewart* v. *West India Co.* (1873), L. R. 8 Q. B. 362. A very usual clause is, "Average to be adjusted according to York-Antwerp rules," referring to a code of rules settled and adopted by a series of International conferences, including one at York in 1864, and one at Antwerp in 1877. See Appendix IV.

(*m*) *Simmonds* v. *White* (1824), 2 B. & C. 805; *Dalglish* v. *Davidson* (1824), 5 D. & R. 6.

(*n*) *Hill* v. *Wilson* (1879), L. R. 4 C. P. D. 329; see also *Fletcher* v. *Alexander* (1868), L. R. 3 C. P. 375; *Mavro* v. *Ocean Insurance Co.* (1875), L. R. 10 C. P. 41.

(*o*) *The Longford* (1881), L. R. 6 P. D. 60.

(*p*) *The Pyrennee* (1863), B. & L. 189; *The Raisby* (1885), L. R. 10 P. D. 114.

(*q*) *The Renpor* (1883), L. R. 8 P. D. 115; *Cargo ex Sarpedon* (1877), L. R. 3 P. D. 28; *The Fusilier* (1865), 3 Moore P. C., N. S. 51.

(*r*) *The Renpor* (1883), L. R. 8 P. D. at p. 118.

(*s*) *The Raisby, vide supra.*

Where, however, the shipowners have paid, or made themselves personally liable to pay, a sum of money for the preservation of ship and cargo, if such payment was justifiable, and did not result from the fault of the shipowners (*t*), they will have a lien on the cargo for the sum that they have justifiably paid (*u*); though the fact that they have *bonâ fide* and reasonably paid a certain sum, is not conclusive that that sum is the basis on which the liability of the cargo-owners is to be reckoned (*x*).

The charterer of a vessel which renders salvage services is not entitled, in the absence of special clauses, to salvage for those services (*z*) unless the charter amounts to a demise, so that at the time of the salvage he is in possession of the vessel (*a*).

Case.—The *R.*, owned by A., rendered salvage services to the *S.*, owned by K., and chartered to A., the charter not amounting to a demise. *Held*, that A. was entitled to salvage from the *S.* (*z*).

Article 122.—*Collision.*

The cargo laden on board a vessel at the time of collision cannot be sued in the Admiralty Court for the damage (*b*), even though it belongs to the owner of the ship, or to the charterer under a charter amounting to a demise (*c*).

The owner of cargo on board a ship sued for collision can only be compelled to pay into court the amount of freight due from him to the shipowner (*d*).

The owner of cargo lost by a collision may, if both ships

(*t*) *The Ettrick* (1881), L. R. 6 P. D. 127.

(*u*) *Briggs* v. *Merchant Traders' Co.* (1849), 13 Q. B. 167; *Cox* v. *May* (1815), 4 M. & S. 152.

(*x*) *Anderson, Tritton, & Co.* v. *Ocean SS. Co.* (1884), L. R. 10 App. C. 107.

(*z*) *The Collier* (1866), L. R. 1 A. & E. 83; *The Waterloo* (1820), 2 Dods. 433; *The Alfen* (1857), Swabey, 189. The charterer may have a claim against the owner for delay or deviation in rendering the salvage; *The Alfen, vide supra.*

(*a*) *The Maria Jane*, 14 Jur. 857 (1850); *The Scout* (1872), L. R. 3 A. & E. 512, and Article 2.

(*b*) *The Victor* (1860), Lush. 72; *The Leo* (1862), Lush. 444.

(*c*) If it were a demise, the charterer would be liable for collision caused by negligence of the chartered ship: *Fenton* v. *Dublin SS. Co.* (1838), 8 A. & E. 835.

(*d*) *The Leo, vide supra; The Flora* (1866), L. R. 1 A. & E. 45.

are at fault, recover half his loss against each ship (*e*); if the other ship is alone in fault he may either recover the whole loss against her, or he may recover it from the carrying ship, unless prevented by exceptions in the contract of affreightment (*f*); if the carrying ship is alone at fault, he may recover the whole loss from her unless prevented by exceptions in the contract of affreightment.

(*e*) *The Milan* (1861), Lush. 388, which is doubtfully consistent with *Thorogood* v. *Bryan* (1849), 8 C. B. 115, as to the authority of which, see *The Bernina* (1886), L. R. 11 P. D. 31.

(*f*) See *Woodley* v. *Michel* (1883), L. R. 11 Q. B. D. 47; *The Xantho* (1886), (C. A.), not yet reported, except in 2 Times, L. R. 704.

SECTION VIII.

Performance of Contract: Unloading.

Article 123.—*Unloading under a Charter.*

At the port of discharge, the duty of providing and making proper use of sufficient means for the discharge of cargo lies in general upon the charterer (*a*).

This duty must be fulfilled when—

(1.) The ship is at the place where the carrying voyage is to end (*a*). (Articles 34–37, 39.)

Neither the master nor any agent of the shipowner is entitled to demand of the consignee before the ship's arrival, whether he will receive the goods consigned to him. A refusal to perform the contract made before the ship's arrival is not necessarily a breach of the contract, unless it is accepted as such by the shipowner, or is still unretracted at the time of the ship's arrival, in which case it is a continuous refusal amounting to a breach of the contract (*b*).

(2.) When she is ready to discharge (*a*).

(3.) Notice to the charterer of the above facts is not necessary, but when they are fulfilled the lay-days allowed for discharging begin. (Article 124.)

Article 124.—*Notice of readiness to discharge, not required.*

In the absence of special contract or custom, the shipowner is not bound to give notice of his readiness to unload

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(*a*) *Per* Lord Selborne in *Postlethwaite* v. *Freeland* (1880), L. R. 5 App. C. at p. 608; *per* Lord Esher in *Nelson* v. *Dahl* (1879), L. R. 12 Ch. D. at p. 583.

(*b*) *Ripley* v. *Maclure* (1849), 4 Ex. 345, as modified and explained by *Hochster* v. *De la Tour* (1853), 2 E. & B. 678; *Frost* v. *Knight* (1872), L. R. 5 Ex. 322; which cases are discussed in *Johnstone* v. *Milling* (1886), 54 L. T. 629 (C.A.).

either to the charterer or to shippers or consignees under bills of lading (*d*).

If, however, the shipowner's wrongful act or omission has prevented the charterer and consignee from learning by reasonable diligence of the ship's readiness to unload, they will to that extent be discharged (*e*).

Case 1.—A ship carried goods under a bill of lading, "to be taken out in fourteen days after arrival, or to pay 10*s*. a day demurrage." The ship was ready to deliver on October 3, but the goods were not landed till October 29. The consignees pleaded:—(1) no notice of arrival; *held*, unnecessary (*f*): (2) that the ship was wrongly entered in the custom-house as *Die Treue* instead of *The Treue*. *Held*, that an entry by the shipowner so inaccurate as to mislead a person using reasonable diligence, would have relieved the consignee from liability for demurrage; but that it was not proved here that reasonable diligence had been used, and that therefore the consignees were liable (*g*).

Case 2.—Under a charter: "the ship to be addressed to charterers' agents free of commission," the ship, in breach of the charter, was addressed by the shipowners to other agents, who gave no notice to consignees, whereby the latter were sued for demurrage. It being proved that the charterer's agent would have given such notice: *Held*, that the shipowner could not claim demurrage, the liability to which arose from his own breach of contract (*h*).

Unloading according to custom of port of discharge, see Articles 45 and 133.

Demurrage in unloading, see Section IX.

Article 125.—*Duty of Master as to delivery at Port of Discharge.*

In the absence of statutory provisions (*i*), customs of the port of discharge (*k*), or express stipulations in the charter or bill of lading, the master on the arrival of the ship at its destination must allow the consignee a reasonable time to

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(*d*) *Harman* v. *Mant* (1815), 4 Camp. 161; *Harman* v. *Clarke* (1815), 4 Camp. 159; *Nelson* v. *Dahl* (1879), *per* Brett, L.J., 12 Ch. D. 583.

(*e*) *Houlder* v. *General Steam Navigation Co.* (1862), 3 F. & F. 170; *Bradley* v. *Goddard* (1863), 3 F. & F. 638; *Harman* v. *Clarke*, *vide supra*.

(*f*) In *Houlder* v. *General Steam Navigation Co.*, *vide supra*, an attempt to prove a custom to give notice to consignees failed.

(*g*) *Harman* v. *Clarke*, *vide supra*.

(*h*) *Bradley* v. *Goddard* (1863), 3 F. & F. 638: and see p. 87, note.

(*i*) Such as 25 & 26 Vict. c. 63, ss. 66–78: Article 127, and Appendix III.

(*k*) *Vide* customs of the leading ports in the United Kingdom, in Appendix II.

receive the goods, and cannot discharge his liability by landing them immediately on the ship's arrival (*l*).

The holder of the bill of lading, who presents it at a reasonable time, is entitled, in the absence of custom to the contrary, to have the goods delivered to him direct from the ship, existing liens being satisfied (*m*).

The shipowner or master is justified in delivering the goods to the first person who presents to him a bill of lading, making the goods deliverable to him, though that bill of lading is only one of a set, provided that he has no notice of any other claims to the goods, or knowledge of any other circumstances raising a reasonable suspicion that the claimant is not entitled to the goods (*n*). If he has any such notice or knowledge he must deliver at his peril to the rightful owner, or must interplead (*o*).

Such delivery by the master will not affect the property in the goods, so as to confer any better right on the claimant than he originally had, as against persons claiming on other parts of the bill of lading (*p*).

Semble, that a warehouseman, with whom the goods have been warehoused under statutory powers, is in the same position as the shipowner as to the delivery of the goods (*q*).

Case.—Goods were shipped and consigned to G. to be delivered in Z. under three bills of lading marked First, Second, Third, respectively. G. indorsed the bill of lading marked "First," to a bank as security for a loan. On the arrival of the goods at Z. they were landed into warehouses by the master, under a stop for freight due on them. G. produced to the warehouseman the bill marked "Second," unindorsed, and was entered in

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(*l*) *Bourne* v. *Gatliff* (1844), 11 Cl. & Fin. 45, at p. 70. This Article will apply to all ports where there are no statutory regulations or customs of the port; for an English port without customs, see *Fowler* v. *Knoop* (1879), L. R. 4 Q. B. D. 299.

(*m*) *Erichsen* v. *Barkworth* (1858), 3 H. & N. 601, at p. 616.

(*n*) *Glyn Mills* v. *East and West India Dock Co.* (1882), L. R. 7 App. C. 591; *The Tigress* (1863), B. & L. 38. See also *Caldwell* v. *Ball* (1786), 1 T. R. 205.

(*o*) *Per* Lord Blackburn, L. R. 7 App. C., at pp. 611, 614. The opinion in *Fearon* v. *Bowers* (1753), 1 H. Bl. 365, n., and any *dicta* approving it in *The Tigress*, *vide supra*, to the effect that the captain is not concerned to examine who has the better right on different bills of lading are overruled by the principal case.

(*p*) *Barber* v. *Meyerstein* (1870), L. R. 4 H. L. 317.

(*q*) See *per* Lords Selborne and Cairns, 7 App. C. p. 597; Lord O'Hagan, p. 601; Lord Blackburn, pp. 609, 614; Lord Watson, p. 614; *per contra*, *per* Lord Fitz-Gerald, p. 617; and *per* Brett, L. J. 6 Q. B. D. 486.

their books as the owner. G. then paid the freight, and gave a delivery order to P., to whom the warehouseman delivered *bonâ fide* and without knowledge of the bank's claim. *Held*, that the warehouseman was not liable to the bank for wrongful delivery of the goods (*r*).

Article 126.—*The Master's power to land or carry on the Goods at Common Law.*

While the master is not, as a general rule, bound to unload unless on production of the bill of lading, he is not bound to keep goods on board his ship if no bill of lading is produced.

If the consignee or holder of the bill of lading does not claim delivery within a reasonable time, the master may land and warehouse the cargo in a statutable (*s*) warehouse at the expense of its owners, still preserving his lien on it, and it is his duty to do so rather than render the charterers, other than the defaulting consignees, liable for demurrage (*t*).

Semble, that if there are no statutable warehouses, delivery into which preserves his lien, he can still retain it by hiring a warehouse for the purpose (*u*).

If, in unloading by the master, owing to the delay or absence of the consignee, difficulties arise, from the inaccurate description of goods in the bill of lading, the consignee must bear the resulting loss (*v*).

If the master is forbidden to land the goods by the port authorities, or cannot obtain warehouse accommodation, he may and must deal with them in the manner both most reasonable to preserve his lien, and most convenient in his judgment for their owner, at their owner's expense (*x*).

(*r*) *Glyn Mills & Co.* v. *East and West India Dock Co.* (1882), L. R. 7 App. C. 591.

(*s*) *I.e.*, a warehouse, on the goods in which the lien of the shipowner is preserved by some statute, such as 25 & 26 Vict. c. 63, s. 68. (See Appendix III.)

(*t*) *Howard* v. *Shepherd* (1850), 9 C. B., at p. 321; *Erichsen* v. *Barkworth*, *vide supra*. This power is also given by express provision in most bills of lading. See Article 127, Note 1.

(*u*) *Mors le Blanch* v. *Wilson* (1873), L. R. 8 C. P. 227.

(*v*) *Shirwell* v. *Shaplock* (1815), 2 Chit. 397.

(*x*) *Cargo ex Argos* (1872), L. R. 5 P. C. 134; *Mors le Blanch* v. *Wilson*, *vide supra*; *Edwards* v. *Southgate* (1862), 10 W. R. 528. See Article 138.

Article 127.—*Statutory Provisions as to Unloading.*

By statute (*y*), a shipowner is at liberty to land any goods imported in his ship from foreign parts into the United Kingdom, whenever (*z*) their owner fails to make entry of them at the custom house, or having made entry fails to take delivery of them within a certain time (*a*), whether such failure was caused by the fault of the goods owner or not, provided it was not caused by the fault of the shipowner (*b*).

This statutory power may be excluded or varied by express agreement (*c*), or by the custom of the port (*d*).

I. *Time* at which such landing may take place.

(1.) If a time is named in the charter or bill of lading, at any time after the expiration of such time (*e*), and before the consignee is ready and offers to take delivery of the goods (*f*).

(2.) If no time is so named, then at any time after the expiration of seventy-two hours, Sundays and holidays excepted, from the report of the ship at the custom house by the master (*g*).

II. *Place where goods are to be landed.*

(1.) If possible and convenient at the wharf or warehouse named in the charter or bill of lading (*h*).

(2.) If no such place is named, at a legal and customary wharf or warehouse for such goods (*i*).

(*y*) 25 & 26 Vict. c. 63, ss. 66–78; see Appendix III.

(*z*) The Act only applies to the case of a consignee failing to be ready to take delivery when the shipowner is ready to land his goods: *per* Brett, M.R., *Marzetti* v. *Smith* (1884), 49 L. T. at p. 583.

(*a*) Where the cargo is apportionable, if the consignee applies in time to take delivery of part, the shipowner is not entitled to land such part unless the consignee's failure to take the first part has prejudiced the shipowner in the delivery of the remainder: *Wilson* v. *London Steam Co.* (1865), L. R. 1 C. P. 61.

(*b*) *The Energie* (1875), L. R. 6 P. C., at p. 316.

(*c*) See Note 1, *post*.

(*d*) Such custom may either apply to the whole port, as in *Marzetti* v. *Smith* (1884), 49 L. T. 580; or to a particular trade; as in *Aste* v. *Stumore* (1884), 1 C. & E. 319, where a custom of the London grain trade to discharge on the quay, if the merchant did not demand the grain within twenty-four hours of ship's arrival, was proved: *Alexiadi* v. *Robinson* (1861), 2 F. & F. 679, at p. 683, where a custom in the London fruit trade of immediate discharge was proved.

(*e*) 25 & 26 Vict c. 63, § 66, s. 1, and see Appendix III.

(*f*) § 66, s. 5. (*g*) § 66, s. 2. (*h*) § 66, s. 3. (*i*) § 66, s. 4.

Where goods are landed for assortment and their owner or consignee at the time of landing has made entry, and is ready to take delivery for another wharf or warehouse, the goods shall, if demanded, be delivered to their owner within twenty-four hours after assortment, the expenses of landing and assortment to be borne by the shipowner (*k*).

Where, before the goods are landed, their owner or consignee has entered them as "overside goods," and has offered and been ready to take delivery of them (*l*), but the shipowner has failed to make delivery of them, or to then inform the offerer when delivery would be made (*m*), the shipowner shall before landing the goods give twenty-four hours' notice in writing to the owner of the goods (*n*) of his intention to deliver, and if he lands before that time, shall do so at his own risk and expense (*o*).

Where the consignee disputes the propriety of landing at his expense, his proper course is to pay under protest any charges incurred, and thus to prevent his being damaged by detention of the goods. He can then sue to recover the payment (*p*).

Note 1.—The operation of these clauses of the Merchant Shipping Act in favour of the consignee is sometimes excluded by a clause in the bill of lading, *e.g.*: — "Simultaneously with the ship being ready to unload the goods or any part

(*k*) § 66, s. 6.

(*l*) The goods owner or his agent must be ready at the time of the offer: *Berresford* v. *Montgomerie* (1864), 17 C. B., N. S. 379. As to "overside goods," or goods to be delivered over the ship's side to a lighter: See Appendix II., Customs of discharging in London.

(*m*) It is not necessary that the agent of the consignee should formally demand correct information: *Berresford* v. *Montgomerie*, *vide supra*; but, *semble*, that if the shipowner is then *bonâ fide* ignorant of the position of the goods in the ship, this does not constitute a "failure to inform:" *Oliver* v. *Colven* (1879), 27 W. R. 822.

(*n*) The lighterman is the agent of the goods owner to receive notice: *The Clan Macdonald* (1883), L. R. 8 P. D. 178, at p. 185.

(*o*) § 66, s. 7. Sub-sections 6 and 7 have been discussed in *The Clan Macdonald* (1883), L. R. 8 P. D. 178, where it was held that section 6 applies to "overside goods," which must be landed for assortment; section 7, to overside goods, which need not be landed for assorting. It is submitted that Sir J. Hannen is in error (p. 184) in making the goods owner's failure to take delivery at the time when it becomes necessary to land the goods for assorting, a condition precedent to the shipowner's right to land the goods at his own expense under § 6; it would seem rather to relieve the shipowner of the necessity of paying such expense. On this, see Mathew, J., in *Marzetti* v. *Smith* (1884), 49 L. T. at p. 583.

(*p*) *Alexiadi* v. *Robinson* (1861), 2 F. & F. 679.

thereof, the consignee of the goods is hereby bound to be ready to receive the same from the ship's side, either on the wharf or quay at which the ship may be for discharge, or into lighters, provided with a sufficient number of men to receive and stow the said goods therein, and in default thereof the master or agent of the said ship is hereby authorized to enter the said goods at the custom house, and land, warehouse, or place them in lighters, at the risk and expense of the consignee of the said goods after they leave the deck of the said ship; and the owners of the ship are to have a lien on the said goods until the payment of all costs and charges so incurred (*q*).

Almost all modern bills of lading have some such clause as one of the following:—

"The goods to be taken from the steamer as soon as she is ready to discharge (and to be received by the consignee, package by package as so delivered), or the same may be transhipped into lighters, $\frac{\text{and}}{\text{or}}$ landed on the quays, $\frac{\text{and}}{\text{or}}$ warehoused, all at the expense and risk of the owners of the goods:"—or:—

"The goods are to be discharged from the ship as soon as she is ready to unload, and if not thereupon removed without delay by the consignees, or if necessary to discharge into hulk, lazaretto, or hired lighters:"—or:—

"The master is to deliver the goods with all reasonable despatch, and the consignees are to be ready to receive them within forty-eight" (or twenty-four) "hours after the ship commences to unload, otherwise the master or agent may discharge and store them at the expense and risk of the owners of the goods:"—or:—

"If the consignees shall not have craft alongside for receiving the goods herein specified, within twenty-four hours after the arrival of the vessel, they may, at shipper's or consignee's risk and expense, be landed and stored or put into hulk or craft, or carried forward to the steamer's furthest port of call, and landed and stored on her return:"—or:—

"The goods are to be discharged from the ship as soon as public intimation is given that she is ready to unload."

Note 2.—When the ship's liability is to cease is usually expressly provided in the bill of lading, *e.g.*:—"Ship's responsibility ceases immediately the goods are discharged from the ship's deck"; or "the goods, &c. . . . as soon as they are discharged over the ship's side shall be at the risk of the shipper or consignee"; or "goods at risk of consignee from ship's tackles:"—or:—

"In all cases the liability of the shipowners is to cease as soon as the goods are free of the tackles of the ship:"—or:—

"The master or agents shall appoint boatmen to take

(*q*) See, for instances of the operation of such a clause, *Alexiadi* v. *Robinson* (1861), 2 F. & F. 679; *Wilson* v. *London, &c., Steam Co.* (1865), L. R. 1 C. P. 61; *Oliver* v. *Colven* (1879), 27 W. R. 822.

delivery from steamer's tackle where the ship's responsibility shall cease, and land the cargo at consignee's risk and expense:" —or:—

"The ship's responsibility ceasing when delivering into lighter when the goods are over the ship's side level with the rail."

Note 3.—There is usually a clause in bills of lading requiring claims for damaged (*r*) goods to be made within a certain time, as before removal, or within seven days after the goods are landed, or within one month of steamer's arrival; or "claims to be preferred only at Liverpool and to be settled direct with the company according to English law, to the exclusion of proceedings in the Courts of any other country:" or "packages are not to be opened by the consignees before the company is discharged and freight paid, provided the said packages are offered in good external condition."

Note 4.—For the practice in discharging general ships in London, Liverpool, Glasgow, Bristol, and Hull, see Appendix II.

(*r*) This includes both apparent and latent damage: *Moore* v. *Harris* (1876), L. R. 1 App. C. 318.

SECTION IX.

DEMURRAGE.

Article 128.—*Nature of Demurrage.*

DEMURRAGE, in its strict meaning, is a sum agreed by the charterer to be paid as liquidated damages for delay beyond a stipulated or reasonable time for loading or unloading. When the time is not agreed, or where the sum is only to be paid for a fixed number of days, and a further delay takes place, the shipowner's remedy is to recover unliquidated "damages for detention." The phrase "demurrage" is sometimes loosely used to cover both these meanings (*a*).

Stipulations for demurrage may be either—

(1.) *Exhaustive:* as "ten days for loading, and demurrage at £20 per diem afterwards," which covers all delay.

(2.) *Partial:* as "ten days to load, ten days on demurrage at £20 per diem," when all delay after twenty days will give rise to damages for detention; or "demurrage at £20 per diem" (*b*), when demurrage will begin at a time unascertained, except that it must allow a reasonable time for loading.

(3.) None: as "ten days to load," or "load according to the custom of the port," or simply "load," where all delay will be met by "damages for detention."

(*a*) For a discussion of the resulting difficulties, see Article 54:—The Cesser clause.

(*b*) *Cf. Harris* v. *Jacobs* (1885), 15 Q. B. D. 247, in which Brett, L.J., laid down that "such a payment was in the nature of demurrage: the clause as to demurrage in a charter being elastic enough in the ordinary construction of a charter to comprise such a damage as this," and cited as authority for it his own judgment in *Sanguinetti* v. *Pacific Co.* (1877), L. R. 2 Q. B. D. 238, at p. 252, for criticisms on which see the Note to Article 54, pp. 110, 111.

Article 129.—*Demurrage, when payable.*

Demurrage becomes payable when the lay-days allowed for loading or unloading have expired. Such lay-days begin when the ship arrives at the place agreed upon in the charter for loading or unloading (*c*), and is there ready to load, and they run continuously (*d*), in the absence of express agreement (*e*), or custom of the port (*f*) to the contrary, from that date.

Damages for detention become payable for any delay after a reasonable time for loading or unloading has expired, or after the lay-days or days on demurrage have expired, if no express provision is made for further demurrage (*g*).

Article 130.—*Demurrage, how calculated.*

Stipulations as to demurrage and lay-days must be strictly limited to those ports to which they are applied in the charter; a reasonable time for loading or unloading will be allowed at other ports on the voyage, to which such stipulations are not applied (*h*).

When the stipulations in a charter as to loading and unloading differ materially it will not be allowable to lump together the days for loading and discharging, an intention to separate them being inferred (*h*).

In the absence of a custom of the port (*i*), or of words

(*c*) *Vide* Articles 36, 39, *ante*. A ship prevented from loading by quarantine is not "ready to load": *White* v. *Winchester* (1886), 13 Sc. Sess. Cases, 4th Ser. 524.

(*d*) *M'Intosh* v. *Sinclair* (1877), 11 Ir. R. C. L. 456; *Nielsen* v. *Wait* (1885), 16 Q. B. D. 67.

(*e*) *E. g.*, "Sundays and holidays excepted."

(*f*) *Nielsen* v. *Wait*, *vide supra*, where a custom of the port of Gloucester not to reckon in the lay-days the time occupied in moving the ship from one place of discharge to another, was held good.

(*g*) Where there is in the charter a liquidated sum fixed for demurrage, that sum will also be *primâ facie* the measure for damages for detention.

(*h*) See *Marshall* v. *Bolckow, Vaughan, & Co.* (1881), 6 Q. B. D. 231; *Niemann* v. *Moss* (1860), 29 L. J. Q. B. 206. For other cases where special stipulations as to demurrage were construed, see *Marshall* v. *De La Torre* (1795), 1 Esp. 367; *Stevenson* v. *York* (1790), 2 Chitt. 570; *Sweeting* v. *Darthez* (1854), 14 C. B. 538.

(*i*) As in *Cochran* v. *Retberg* (1800), 3 Esp. 121, where a custom of the port of London to consider "days" as "working days" only, excluding Sundays and holidays, was proved and admitted. For a custom of the port negativing "consecutiveness," see *Nielsen* v. *Wait* (1885), 16 Q. B D. 67. The "running day," or day of twenty-four hours during which the ship is running, is opposed to the

showing another intention (*k*), the terms "days," or "lay-days," or "hours" (*l*), in a stipulation as to demurrage, mean "running days," or consecutive days of twenty-four hours, or consecutive hours, and include Sundays and holidays (*m*).

A part of a day or hour counts as a whole day or hour (*n*).

Case 1.—A ship chartered "to load and discharge as fast as the ship can work, but a minimum of seven days to be allowed merchants, and ten days on demurrage over and above the said laying days." *Held*, that from the context, "days" meant "working" not "running days."

The ship came into dock on Tuesday evening at 5 P.M., she reached her berth on Wednesday, at 8 A.M., and continued unloading till 8 P.M. She began again at 4 A.M. on Thursday, and finished at 8 A.M. *Held*, she was liable for two days' demurrage, (the lay-days having been exhausted at the port of loading) (*n*).

Case 2.—A ship was chartered "to be loaded in X. in fourteen days, and to be discharged, weather permitting, at not less than twenty-five tons per working day, holidays excepted." *Held*, that the days for loading must be taken as "running days," the days for unloading as working days (*p*).

Article 131.—*Charterer's Undertaking:—To load or unload in a fixed Time.*

If by the terms of the charter the charterer has agreed to load or unload within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever be the nature of the impediments which prevent him from performing it (*q*), unless such impediments are covered by exceptions in the charter, or arise from the shipowner's default (*r*).

Thus after the ship is ready to load or to unload the

"working day" of a smaller number of hours in which alone by the custom of the port work is done. If the stipulation as to demurrage covers both loading and unloading, the days so spent of course cannot be consecutive, but they will be consecutive at each port.

(*k*) *Commercial S. S. Co.* v. *Boulton* (1875), 10 L. R. Q. B. 346; *Harper* v. *M'Carthy* (1806), 2 B. & P. N. R. 258.

(*l*) It is now usual, especially in the case of steamers, to stipulate for demurrage at so much per hour. Where "despatch money" was to be paid at 10*s.* per hour on any time saved in loading or discharging, and four days were saved, it was held that they were to be taken as of twenty-four, and not of twelve, hours each, the "despatch money" being payable on the time saved, or running hours, and not on the working hours: *Laing* v. *Holloway* (1878), L. R. 3 Q. B. D. 437.

(*m*) *Brown* v. *Johnson* (1842), 10 M. & W. 331; *Niemann* v. *Moss* (1860), 29 L. J. Q. B. 206.

(*n*) *Commercial S. S. Co.* v. *Boulton*, *vide supra*.

(*p*) *Niemann* v. *Moss* (1860), 29 L. J. Q. B. 206.

(*q*) *Per* Lord Selborne in *Postlethwaite* v. *Freeland* (1880), L. R. 5 App C. p. 599, at p. 608.

(*r*) *Benson* v. *Blunt* (1841), 1 Q. B. 870.

charterer will not, in the absence of express exceptions, be released from his contract by delay resulting from the crowded state of the docks (*s*), bad weather (*t*), or ice preventing loading (*u*), insufficient supply of cargo (*x*), or lawful (*y*) orders of the authorities at a foreign port (*z*).

The provisions of the charter as to fixed days must be limited to the ports to which they expressly refer (*a*), and a reasonable time will be allowed for loading or unloading at ports not expressly provided for (*b*).

Case 1.—A ship was chartered to unload in the London Docks, forty days being allowed as lay-days; owing to the crowded state of the docks, the vessel was detained forty-one days over the lay-days. *Held*, that the charterer was liable for the delay (*c*).

Case 2.—A ship was chartered to load at London, with thirty running days; owing to frost the loading of the ship was prevented. *Held*, the charterer was liable for the delay (*d*).

Case 3.—A ship was chartered to load at X., with sixty running days; while there, owing to an infectious disease on shore, communication between ship and shore was forbidden by the local government. *Held*, the charterer was liable for the delay (*e*).

Case 4.—A ship was chartered to load barley at a Russian port, with thirty running days for loading and unloading; the Russian government forbade the export of barley (*f*). *Held*, the charterer was liable for failure to furnish a cargo (*g*).

(*s*) *Randall* v. *Lynch* (1810), 2 Camp. 352; *Brown* v. *Johnson* (1843), 10 M. & W. 331; *Tapscott* v. *Balfour* (1872), L. R. 8 C. P. 46; on which case, see note, *ante*, p. 81.

(*t*) *Thiis* v. *Byers* (1876), L. R. 1 Q. B. D. 244.

(*u*) *Barrett* v. *Dutton* (1815), 4 Camp. 333.

(*x*) See Article 42.

(*y*) Illegal orders of the authorities will not protect the charterer, who has his remedy against them: *Bessey* v. *Evans* (1815), 4 Camp. 131; *Gosling* v. *Higgins* (1808), 1 Camp. 450; *The Newport* (1858), Swabey, 335. Compare the principle involved in *Evans* v. *Bullock* (1877), 38 L. T. 34; *Ronneberg* v. *Falkland Islands* (1864), 17 C. B., N. S. 1; *Sully* v. *Duranty* (1864), 3 H. & C. 270; and Article 4 on Illegality.

(*z*) *Barker* v. *Hodgson* (1814), 2 M. & S. 267; *Blight* v. *Page* (1801), 3 B. & P. 295, note, cited also at 4 Camp. 334, by Gibbs, C.J., who was counsel in it. Where a ship otherwise ready to load is prevented from loading by quarantine, the lay-days stipulated in the charter will not begin to run till the quarantine has expired: *White* v. *Winchester* (1886), 13 Sc. Sess. Cases, 4th Ser. 524.

(*a*) *Marshall* v. *De La Torre* (1795), 1 Esp. 367; *Stevenson* v. *York* (1790), 2 Chitty, 570.

(*b*) *Sweeting* v. *Darthez* (1854), 14 C. B. 538. See also *Fowler* v. *Knoop* (1878), L. R. 4 Q. B. D. 299.

(*c*) *Randall* v. *Lynch* (1810), 2 Camp. 352.

(*d*) *Barrett* v. *Dutton* (1815), 4 Camp. 333.

(*e*) *Barker* v. *Hodgson* (1814), 2 M. & S. 271.

(*f*) Compare with this *Hills* v. *Sughrue* (1846), 15 M. & W. 253, where the shipowner who had contracted to procure and carry a cargo of guano was held liable for not loading such a cargo, though there was no guano to load. This case seems quite inconsistent with *Clifford* v. *Watts* (1870), L. R. 5 C. P. 577.

(*g*) *Blight* v. *Page* (1801), 3 B. & P. 295, note; see Article 4: on Illegality.

Article 132.—*To load or unload in reasonable Time.*

If no fixed time for loading (or unloading) is stipulated in the charter the law implies an agreement on the part of the charterer to load or discharge the cargo within a reasonable time (*h*), and, so far as there is a joint duty in loading or unloading, that the merchant and shipowner should each use reasonable diligence in performing his part (*i*).

"A reasonable time" means reasonable under the circumstances then existing, other than self-imposed inabilities of either shipowner or charterer (*j*), and should be estimated with reference to the means and facilities then available at the port, and the course of business at the port (*k*).

"Forthwith" = without unreasonable delay (*l*).

Case 1.—A ship was chartered to discharge in London, the charter containing no provisions as to the time of unloading. Owing to the crowded state of the docks, the ship, though discharged in her turn, was delayed forty days beyond the usual time for discharge of such ships when the docks are not over crowded. *Held*, that the charterer was not liable, both parties having used reasonable diligence to get the ship discharged (*m*).

Case 2.—A ship was chartered to load a cargo at Valencia, without any stipulation as to time of loading. The law of Spain forbids vessels with military stores on board to load at Spanish ports. The charterer and shipowner were aware at the time of making the charter that the vessel intended to carry military stores. The ship arrived at V., with military stores on board and was refused permission to load. *Held*, that neither party was liable to an action, as each, having used reasonable diligence to avoid the danger, was prevented by the act of a superior power (*n*).

(*h*) *Per* Lord Selborne in *Postlethwaite* v. *Freeland* (1880), L. R. 5 App. C. 608.

(*i*) *Ford* v. *Cotesworth* (1870), L. R. 4 Q. B. at p. 137; L. R. 5 Q. B. 544; *Cunningham* v. *Dunn* (1878), L. R. 3 C. P. D. 443 (C.A.)

(*j*) See note (*p*); *sub* p. 214.

(*k*) *Per* Lord Selborne, in *Postlethwaite* v. *Freeland*, *vide supra*, at p. 609.

(*l*) *Hudson* v. *Hill* (1874), 43 L. J. C. P. 273.

(*m*) *Burmester* v. *Hodgson* (1810), 2 Camp. 488. So explained in *Ford* v. *Cotesworth*, *v.s.* Lord Selborne in *Postlethwaite* v. *Freeland*, at p. 608, accepts without comment Lord Mansfield's ruling that the implied covenant is to unload a cargo in the usual and customary time, which the Court in *Ford* v. *Cotesworth* had dissented from (L. R. 4 Q. B. at p. 137).

(*n*) *Cunningham* v. *Dunn* (1878), L. R. 3 C. P. D. 443 (C.A.), following *Ford* v. *Cotesworth* (1870), L. R. 5 Q. B. 544. These two cases seem reconcilable with such cases as *Barker* v. *Hodgson* (1814), 2 M. & S. 271, and *Blight* v. *Page* (1801), 3 B. & P. 295, note, cited in the last Article; by the presence in the latter class of cases of a definite time for loading or unloading. Thus Martin, B., says in *Ford* v. *Cotesworth* "the fact of the delay being caused by the act of God, or other *vis major*, does not relieve the charterer from liability for demurrage where the loading or unloading is to be done *in a certain time*, and I have no doubt that is

Article 133.—*To load or unload with customary despatch or in customary manner.*

If an obligation to load or unload, indefinite as to time, is qualified or partly defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that custom or practice which the charterer or shipowner could not have overcome by the use of any reasonable diligence (*o*) ought to be taken into consideration (*p*).

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the true principle where the freighter has entered into a positive undertaking to load or discharge in a given number of days; but there the liability is created by the charterer's own act in entering into the positive undertaking." *Cunningham* v. *Dunn*, and *Ford* v. *Cotesworth* should therefore be limited to cases where no express time is stipulated for, but a reasonable one is implied, and the obstacle prevents either party from performing the contract. See also *Sjoerds* v. *Luscombe* (1812), 16 East, 201.

The parties may have expressly provided for such cases by the charter, as in *Adamson* v. *Newcastle Insurance Association* (1879), L. R. 4 Q. B. D. 462, where there was a clause "in case of war, blockade, or prohibition of export, preventing loading, this charter to be cancelled," and it was held that the occurrence of these events cancelled the charter, without any express election by either party.

(*o*) In *Carali* v. *Xenos* (1862), 2 F. & F. 740, the shipowner had contracted to forward goods by foreign steamer, but missed the last steamer of the season; he had discharged according to the custom of the port, but could by diligence have expedited the discharge of these goods so as to catch the steamer. *Held*, that he was liable for the delay, apparently on the ground that he had not used what was due diligence under the circumstances.

(*p*) Lord Selborne in *Postlethwaite* v. *Freeland* (1880), L. R. 5 App. C. 608: see also *Salvesen* v. *Gray* (1885), 13 Sc. Sess. Cases, 4th Ser. 85. Where the charter is "to deliver as fast as the custom of the port would allow," and the bill of lading is silent, and there is no custom of the port: *Held*, that the implied contract in the bill of lading to deliver within a reasonable time prevails: *Fowler* v. *Knoop* (1878), 4 Q. B. D. 299. As to damages for not loading "in regular turn," see *Jones* v. *Adamson* (1876), L. R. 1 Ex. D. 60; *Taylor* v. *Clay* (1846), 9 Q. B. 713.

According to Lord Blackburn (L. R. 5 App. C. at pp. 620, 621), the "usual and customary time" is to be construed with reference to the state of things then existing. It is not however easy to reconcile this with either Lord Hatherley's remarks (L. R. 5 App. C. at p. 612) or the case of *Ashcroft* v. *Crow Colliery Co.* (1874), L. R. 9 Q. B. 540. There the vessel was to be loaded with "the usual despatch of the port," and the regulations of the port prevented the charterer, who had other vessels to load, from loading the ship so quickly as another merchant could have done. The vessel was loaded with the usual despatch of such a vessel at that time with such a charterer; but not with the usual despatch at that time of such a vessel with an ordinary charterer, or with the usual despatch of a vessel in the ordinary state of the port. The Court held that the vessel was not loaded with the usual despatch, and Lord Blackburn (L. R. 5 App. C. at p. 622) says: "this is probably right." If so the distinction must be that the cause of the delay was the charterer's own act, a "self-imposed inability," which constitutes absence of reasonable diligence. Thus though the then state of the port is material in deciding what is "the usual despatch," the then state of the charterer's engagements is not. See also *Wright* v. *New Zealand Shipping Co.* (1879), L. R. 4 Ex. D. 165; *Tillett* v. *Cwm Avon* (1886), 2 Times L. R. 675, and note (*r*), p. 215.

Case 1.—A ship was chartered to unload at London "in the usual and customary time." The ship was discharged in her turn, with due diligence, but, owing to the crowded state of the docks, was detained forty-nine days longer than the usual time of discharge when the docks were not crowded. *Held*, that the charterer was not liable (*q*).

Case 2.—A ship was chartered to deliver rails at Z., "the cargo to be discharged with all despatch according to the custom of the port." The custom was to discharge such cargo by a warp and lighters, which were under the absolute control of a company, who discharged vessels in their order of arrival. Owing to the number of vessels, and the insufficiency of lighters, the vessel did not begin to discharge for thirty-one days. Lighters could not have been procured from elsewhere in sufficient time to lessen the delay. *Held*, that the charterer (C.) was only bound to use the means of despatch habitually used at the port, and having used these with all the diligence in his power, was not liable for demurrage (*r*).

Case 3.—A ship was chartered to unload "in the usual and customary manner;" during her unloading the authorities stopped her discharge, and

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(*q*) *Rodgers* v. *Forrester* (1810), 2 Camp. 483.

(*r*) *Postlethwaite* v. *Freeland* (1880), L. R. 5 App. C. 599.

This decision leaves the authority of *Wright* v. *New Zealand Shipping Co.*, (1879, L. R. 4 Ex. D. 165), in a very unsatisfactory condition. In that case there was no express stipulation as to the time of unloading; the port was crowded and always was at that time of year, and nearly half the ships in the port belonged to the charterers (C.); there was an insufficient supply of lighters; only two firms had them, and C. only employed one. The ship was detained seventy-two, instead of thirty-five days. In the Court of Appeal, Bramwell, Cotton, and Thesiger, L.JJ., though holding that C. was not bound to provide appliances not ordinarily used at the port, decided that an insufficient supply of lighters owing partly to C.'s own engagements was no defence. In *Postlethwaite* v. *Freeland*, Cotton, L.J., held to his original opinion, but Brett and Thesiger, L.JJ., held that C. was not liable. Thesiger, L.J., distinguished his previous decision on three grounds: (1) in that case there was no express provision as to the custom of the port: (2) the charterer's inability rested partly on the number of his own vessels: (3) that the number of vessels, being exceptional, could not be considered. This last reason appears very unsatisfactory in view of *Burmester* v. *Hodgson* (1810), 2 Camp. 489, and *Rodgers* v. *Forrester* (1810), 2 Camp. 483. When the case came before the House of Lords, Lord Selborne distinguished *Wright* v. *New Zealand Shipping Co.* on two grounds; (1) there was then no express reference to the custom of the port; (2) there was no evidence that reasonable diligence would not have enabled the charterer to provide sufficient lighters. Lord Blackburn expressly disapproved of the case, but curiously enough approved *Ashcroft* v. *Crow Colliery Co.* (1874), L. R. 9 Q. B. 540, *et vide supra*, note (*p*), which also turned on a "self-imposed inability" of the charterer, owing to the number of vessels he had contracted to load, this being one of the grounds on which Cotton, L.J., had based his judgment in *Wright* v. *New Zealand Co.* The dicta of some of the Lords Justices that "reasonable time" refers to ordinary circumstances, cannot be supported, but must, it is submitted, be read, "a time reasonable in the then circumstances, so far as they are not caused by self-imposed liabilities, or negligence on the part of the charterer, such as engagements to discharge more vessels than he can discharge in a reasonable time." *Wright* v. *New Zealand Co.* was followed by the Divisional Court, in *Tillett* v. *Cwm Avon* (1886), 2 Times L. R. 675, where the consignees of goods under a bill of lading with no stipulation as to unloading, were owners of three out of the five berths at the port of discharge, but had ships already discharging there, whereby the ship was detained seven days before she could begin to discharge. It was *held*, that the consignees were liable for the delay as unreasonable. The relation of *Ashcroft* v. *Crow Colliery Co.*, *vide supra*, to *Tapscott* v. *Balfour* (1872), L. R. 8 C. P. 46, has been discussed: *ante*, note to Article 39, p. 81.

ordered her to leave her discharging berth. *Held*, that the charterers were not liable for such delay, for, as both parties were to concur in the act of unloading, the implied contract was that each would use reasonable diligence in performing his part; and the intervention of superior authority, which could not have been avoided by any diligence, excused both parties (*s*).

Article 134.—*Who are liable for demurrage on a Charter.*

Where there is a charter containing express stipulations as to demurrage, there will be liable on it, for demurrage:—

(1.) The charterer and his agents (*t*), unless (A.) they have been freed by the cesser clause (*u*); or (B.) they have been freed by a new contract on the bill of lading (*x*).

(2.) The parties to the bill of lading, if the charterparty stipulations as to demurrage are expressly incorporated in the bill of lading (*y*).

Case 1.—A ship was chartered with the usual stipulations for freight, demurrage, and a cesser clause. The charterers shipped the cargo themselves, and accepted bills of lading, making the goods deliverable to themselves at port of discharge, "they paying freight and all other conditions as per charter." In an action by shipowners against charterers as consignees under the bill of lading, for demurrage at the port of discharge. *Held*, that they were liable, as the bill of lading only incorporated those clauses of the charter which were consistent with its character as a bill of lading, and therefore, though it incorporated the provisions as to demurrage, did not incorporate the cesser clause (*x*).

Case 2.—C. chartered a ship from A., to pay a named freight, sixteen lay-days, and demurrage at £2 per day. C. shipped a cargo consigned to G. in London, under a bill of lading, "paying freight as per charter," with a memorandum in the margin, "there are eight working days for unloading in London." G. was sued by A. for demurrage. *Held*, that as the bill of lading did not clearly show that the conditions as to demurrage in the charter were incorporated in the bill of lading, G. was not liable (*z*).

Case 3.—Under a bill of lading of goods deliverable to G., "he paying for said goods as per charter, with primage and average accustomed," G.

(*s*) *Ford* v. *Cotesworth* (1870), L. R. 5 Q. B. 549. The remarks of Baron Martin shew that this decision must be limited to cases where no fixed time for loading has been stipulated for: see note (*n*), *supra*, p. 213; see also *Sjoerds* v. *Luscombe* (1812), 16 East, 201.

(*t*) See the cases on charterparty freight, Article 144.

(*u*) See Article 54.

(*x*) *Gullischen* v. *Stewart* (1884), 13 Q. B. D. 317.

(*y*) They were held to be incorporated in *Porteus* v. *Watney* (1878), L. R. 3 Q. B. D. 535; *Wegener* v. *Smith* (1854), 15 C. B. 285; *Gray* v. *Carr* (1871), L. R. 6 Q. B. 522: not to be incorporated in *Chappel* v. *Comfort* (1861), 10 C. B., N. S. 802; *Smith* v. *Sieveking* (1855), 4 E. & B. 945.

(*z*) *Chappell* v. *Comfort* (1861), 10 C. B., N. S. 802.

was held not liable for demurrage at the port of loading, due under the charter (*a*).

Case 4.—C. chartered a ship from A., "fifty running days to be allowed for loading, and ten days on demurrage over and above the said laying days at £8 per day," the owner to have a lien for demurrage: there was a cesser clause. C. shipped goods under a bill of lading, "to be delivered as per charter to G., he paying freight and all other conditions or demurrage as per charter." The ship was detained at her port of loading, ten days on demurrage, and eighteen days besides. A. claimed a lien against G. for demurrage and damages for detention. *Held*, that G. was liable for the demurrage, but not for the damages for detention, which were not clearly included in the bill of lading (*b*).

Article 135.—*Who is liable for demurrage in a Bill of Lading.*

Where there is an express stipulation as to demurrage contained in a bill of lading, demurrage due under it will be payable by:—

(1.) The shipper or consignor (*c*);

(2.) By every person presenting such bill of lading and demanding delivery under it (*d*), if the jury find from such demand an agreement in fact to pay it (*e*).

(3.) Under the Bills of Lading Act (*f*), by every consignee named in the bill of lading to whom the property has passed by such consignment, or indorsee to whom the property has passed, either by indorsement or by indorsement followed by delivery.

There is contained in every bill of lading an implied contract by the consignor, to unload the goods in a reasonable time (*g*); on this contract the consignee named in the

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(*a*) *Smith* v. *Sieveking* (1855), 4 E. & B. 945.

(*b*) *Gray* v. *Carr* (1871), L. R. 6 Q. B. 522.

(*c*) *Cawthron* v. *Trickett* (1864), 15 C. B., N. S. 754.

(*d*) Per Cave, J., in *Allen* v. *Coltart* (1883), 11 Q. B. D. 782, at p. 785; *Palmer* v. *Zarifi* (1877), 37 L. T. 790; *Dobbin* v. *Thornton* (1806), 6 Esp. 16; *Jesson* v. *Solly* (1811), 4 Taunt. 52; *Stindt* v. *Roberts* (1848), 5 D. & L. 460; *Young* v. *Moeller* (1855), 5 E. & B. 755; *Wegener* v. *Smith* (1854), 15 C. B. 285: on which cases see Selborne, L.C., in 10 App. C. p. 89. That such delivery is good consideration for a promise to pay demurrage: see *Scotson* v. *Pegg* (1861), 6 H. & N. 295; *Benson* v. *Hippius* (1828), 4 Bing. 455.

(*e*) *Sanders* v. *Vanzeller* (1843), 4 Q. B. 260.

(*f*) 18 & 19 Vict. c. 111 (Appendix III.); see also *Allen* v. *Coltart*, *vide supra*, and Article 75.

(*g*) *Fowler* v. *Knoop* (1878), L. R. 4 Q. B. D. 299; *The Clan Macdonald* (1883), L. R. 8 P. D. 178; *Tillett* v. *Cwm Avon* (1886), 2 Times L. R. 675. 18 & 19 Vict. c. 111. The effect is to render the earlier cases, such as *Evans* v. *Forster* (1830), 1 B. & Ad. 118, of doubtful authority.

bill of lading and the indorsee to whom the property has passed will be, and the person taking delivery under such bill of lading may be, liable (*h*). On this implied contract the shipowner and not the master is entitled to sue (*i*).

Case 1.—Goods were shipped under a bill of lading, with a memorandum, "ship is to be cleared in sixteen days, and £8 per day demurrage to be paid after that time." *Held*, that the consignee taking delivery of goods under such a bill of lading was liable to pay the demurrage (*k*).

Case 2.—A bill of lading, containing clauses as to demurrage, was pledged to I. for advances. I. took delivery of goods under the bill of lading. *Held*, that I. was not liable under the Bills of Lading Act to pay demurrage, merely by reason of the pledge of the bill of lading, but that he became liable by taking delivery of the goods under it (*l*).

Case 3.—C. chartered a ship from A., "to be discharged as fast as the custom of the port would allow," and took bills of lading for the cargo, which did not refer to demurrage. There was no custom of the port of discharge. G. the consignee, had sold the beneficial interest in the goods to P., and gave a delivery order in his favour. *Held*, that G., as consignee, was liable on the implied contract in the bill of lading under the Bills of Lading Act (*h*).

(*h*) *Fowler* v. *Knoop* (1878), L. R. 4 Q. B. D. 299.

(*i*) *Brouncker* v. *Scott* (1811), 4 Taunt. 1; *Evans* v. *Forster*, *vide supra*; *Cawthron* v. *Trickett*, *vide supra*, where the master, who was a part owner and managing owner, was held entitled to sue the consignor on the implied contract.

(*k*) *Jesson* v. *Solly* (1811), 4 Taunt. 52.

(*l*) *Allen* v. *Coltart* (1883), 11 Q. B. D. 782.

SECTION X.

FREIGHT.

Article 136.—*Freight: what it is.*

"FREIGHT," in the ordinary mercantile sense, is the reward payable to the carrier for the carriage and arrival of the goods ready to be delivered to the merchant (*a*). The true test of the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed (*b*), or if not whether its performance has been prevented by the act of the cargo-owner (*c*).

Under a simple contract to pay freight (*b*) no freight is payable if the goods are lost (*d*) on the voyage (*e*), or for any other reason, except the fault of the merchant alone (*f*), are not delivered at the port of destination.

(*a*) The definition of the Judicial Committee in *Kirchner* v. *Venus* (1859), 12 Moore, P. C. 361, at p. 390, is, "Freight is the reward payable to the carrier for the safe carriage and delivery of goods." On this we may remark that *Dakin* v. *Oxley* (1864), 15 C. B., N. S. 646, see p. 665, shows that *safe* carriage in the sense of delivery of goods in good condition is not necessary, and that cases like *Cargo ex Argos* (1873) L. R. 5 P. C. 134, and *Cargo ex Galam* (1863), B. & L. 167, show that actual delivery of goods is not essential, readiness to deliver sufficing.

(*b*) *Per* Willes, J., *Dakin* v. *Oxley* (1864), 15 C. B., N. S. 646, at p. 664; *Kirchner* v. *Venus* (1859), 12 Moore, P. C. 361, at p. 390, and Section XI., on Lien, *post*.

(*c*) *Cargo ex Argos, vide supra; Cargo ex Galam, vide supra;* and Article 139.

(*d*) A guarantee of a gross freight of £900 will be payable if the freight is less than £900, though the vessel is lost on the voyage, as the breach occurs at the port of loading: *Carr* v. *Wallachian Co.* (1867), L. R. 2 C. P. 468.

(*e*) As to whether a charter includes one voyage or two, so that freight is payable for a part of the chartered services, though the ship is lost in performing the other part; see *Mackrell* v. *Simond* (1776), 2 Chit. 666. The clause "ship lost or not lost" is now very usual. This clause only refers to losses through perils excepted: *G. Indian Railway Co.* v. *Turnbull* (1885), 53 L. T. 325. Sometimes the clause "freight to be considered earned, ship lost or not lost, at any stage of the entire transit" is found in through bills of lading; see Article 22.

(*f*) See Article 139.

From the signing and delivery of bills of lading (*e*), while the goods are in course of carriage without unreasonable delay, and until they are delivered to the merchant, the master of the ship has a lien on them for the freight due for such carriage, and cannot be compelled to part with them till such freight is paid and the bills of lading delivered up (*g*).

These incidents to freight exist by rule of law, and do not need a bill of lading or other written contract between the parties to support them, though they may be excluded by such a written contract (*g*).

The term "freight" will be presumed to have its ordinary mercantile meaning (*h*), unless evidence is found in the charter or bill of lading, which negatives this, or raises an ambiguity, when oral evidence may be given as to the intention of the parties (*i*).

Case 1.—Goods were shipped under a bill of lading with the words, "Freight payable in London." Evidence was tendered that by the custom of the steam shipping trade this meant "freight payable in advance in London." *Held*, inadmissible, the word "freight" being well understood, and there being no words here to qualify it (*k*).

Case 2.—Evidence tendered to shew that the term "freight" in a charter, which also referred to "passage money," included the passage money of steerage passengers. *Held*, inadmissible (*l*).

(*e*) *Tindal* v. *Taylor* (1854), 4 E. & B. 219, at p. 227; *Thompson* v. *Trail* (1826), 2 Car. & P. 334. And see Article 150, on Liens, *post*.

(*g*) *Dakin* v. *Oxley* (1864), 15 C. B., N. S. 646, at p. 664; *Kirchner* v. *Venus* (1859), 11 Moore, P. C. 361, at p. 390.

(*h*) *Krall* v. *Burnett* (1877), 25 W. R. 305; *Lewis* v. *Marshall* (1844), 7 M. & G. 729; *Blakey* v. *Dixon* (1800), 2 B. & P. 321. This will allow the introduction of usages of the particular trade, or practices of merchants creating rights between the parties to a contract in respect of some matter which is not in terms provided for by the contract; see *per* Willes, J., in *Meyer* v. *Dresser* (1864), 16 C. B., N. S. 646, at p. 662, and Article 8, *ante*. So *Brown* v. *Byrne* (1854) 3 E. & B. 703; where a custom at Liverpool as to discount from freight was held binding: See also *Russian Steam Navigation Co.* v. *De Silva* (1863), 13 C. B., N. S. 610; *The Norway* (1865), 3 Moore P. C., N. S. 245. In *Meyer* v. *Dresser* (1864), 16 C. B., N. S. 646, evidence of a particular method of payment of freight, tendered as a "general custom of merchants," was rejected as a mere mode of carrying on business; and in *Kirchner* v. *Venus*, *vide supra*, evidence of custom as to freight was held inadmissible on the ground that one of the parties, being ignorant of it, could not have intended, or be presumed to have intended to be bound by it: *sed quaere*; and see note, *ante*, p. 19.

(*i*) *Lidgett* v. *Perrin* (1861), 11 C. B., N. S. 362; *Andrew* v. *Moorhouse* (1814), 5 Taunt. 435; and see Article 8.

(*k*) *Krall* v. *Burnett*, *vide supra*. See also *Mashiter* v. *Buller* (1807), 1 Camp. 84, criticised by Brett, J., L R. 1 App. C. 218.

(*l*) *Lewis* v. *Marshall* (1844), 7 M. & G. 729.

Case 3.—Goods were shipped under a bill of lading, which was not produced at the trial; but the shipping card contained the words "freight payable here." There was also tendered oral evidence of conversations as to this clause. *Held*, ambiguous as to the time of payment, the oral evidence admissible, and the nature of the actual contract a question for the jury (*m*).

Case 4.—Alleged contract to pay the sum due for freight and carriage of goods on the delivery of the bill of lading. *Held*, nothing recoverable *sub nomine* freight, as nothing could be due on the delivery of the bill of lading without a special contract, "freight" not being due till the delivery of the goods (*n*).

Note 1.—"*With Primage and Average accustomed.*"—*Primage* was originally a small payment made by the merchant to the master for care and attention bestowed on his goods, for which the master could sue (*o*). By the master's agreement with the shipowner, primage may and usually does belong to the shipowner; and in that case the master cannot contract in the bill of lading that it should be paid to him (*p*). Primage at the present time is a percentage on the freight, paid to the shipowner by the merchant; part of it is sometimes allowed to the merchant's shipping agent by the shipowner as his remuneration, being in effect a sort of commission. It is very rare to find a master receiving primage at the present day.

Average accustomed, or petty average, refers to certain small charges and expenses which used to be borne partly by ship and partly by cargo; the charge is now obsolete.

Note 2.—Freight is usually payable under a voyage charter, in accordance with the express provisions of the charter, thus: a certain proportion of the freight, or a certain lump sum on sailing; remainder on delivery, either by cash or by specified bills. If the charter is a round charter, or there are loading and discharging expenses in the course of the voyage, such disbursements are usually by the charter to be advanced against the freight by the charterers or their agents (*q*).

The time charter clause speaks for itself. The following are specimens of clauses as to freight in charters:—

"On being paid freight on the quantity delivered at the rate of , freight being paid—one third in cash on signing bill of lading less 5 per cent. for interest and insurance; sufficient cash, at current rate of exchange, for ship's disbursements, to be advanced free of charge, at port of discharge, and the remainder

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(*m*) *Lidgett* v. *Perrin*, *vide supra*, distinguishable from *Krall* v. *Burnett* by the special facts.

(*n*) *Blakey* v. *Dixon* (1800), 2 B. & P. 321.

(*o*) *Charleton* v. *Cotesworth* (1825), R. & M. 175; *Best* v. *Saunders* (1828), M. & M. 208.

(*p*) *Caughey* v. *Gordon* (1878), 3 C. P. D. 419.

(*q*) Under certain circumstances the charterers may in effect have to pay their advances twice: *Rodoconachi* v. *Milburn* (1886), L. R. 17 Q. B. D. 316, *sed quære*. This case is now (Oct. 1886) under appeal.

by an approved bill in London, at three months' date on the right and true delivery of the cargo agreeably to bills of lading:"—or in a time charter:—

"The charterers shall pay for the use and hire of the said vessel at the rate of per gross register ton per calendar month, and at and after the same rate for any part of a month; time to continue until the delivery to the owners, unless lost, at London. Should the vessel be lost without being heard of, hire shall cease to be due fifteen days after the date on which she left her last port."

Where the charterers propose to put the ship up as a general ship, and the captain may sign bills of lading at a lower rate of freight than the charter, the shipowners usually protect themselves thus: "any difference between charter and bill of lading to be settled at port of loading before sailing; if in vessel's favour, to be paid in cash, at current rate of exchange less insurance; if in charterer's favour, by captain's draft, payable three days after ship's arrival at port of discharge."

Note 3.—Stipulations as to the payment of freight in the bill of lading vary very much. It is very common to find the freight made due and payable "on shipment of the goods," or "in exchange for bills of lading," or "on or before the departure of the vessel." A very usual clause is "Freight for the said goods with primage to become due on shipment, and to be paid in London in cash without deduction, ship lost or not lost;" where the freight is to be paid on delivery it is sometimes secured thus: "Freight and primage for the said goods to be paid at destination, but if the consignee for any reason, perils of the sea excepted, refuses to pay the same, shippers hereby undertake to pay amount here on demand," or "to be delivered after safe arrival at Z. to G., freight for the said goods as per margin being paid first in London." The clause "ship lost or not lost," almost always appears. A proviso is sometimes inserted for the payment of double freight on goods incorrectly described.

Article 137.—*Advance Freight.*

Where money is to be paid by the shipper to the shipowner before the delivery of the goods, such payment will be treated as an advance of freight, or as a loan, according to the intention of the parties as expressed in the documents (*r*). A stipulation that it shall be paid "subject to

(*r*) *Allison* v. *Bristol Marine Insurance Co.* (1876), L. R. 1 App. C. 209, at pp. 217, 233, in which all the cases are discussed by Brett, J., and *Kirchner* v. *Venus* (1859), 12 Moore, P. C. 361, is explained.

insurance," or "less insurance," will indicate that the payment is in advance of freight (*s*).

If it is an advance of freight, it must be paid, though the goods are before payment lost by excepted perils, and it will not be recoverable from the shipowner if the goods are after payment so lost (*t*). It will be recoverable if the goods are not lost by excepted perils (*x*), or if the shipowner has not fulfilled the condition precedent, of the starting within a reasonable time of a seaworthy ship on the agreed voyage (*z*).

If advance freight be not paid at the time specified, there will not be a lien for it on the goods carried, without express stipulation (*a*).

Payments for ship's use by the person liable to pay freight, before such freight is due, without authority from the contract of affreightment, will be treated rather as loans than as prepayment of freight (*b*).

If the payment in advance is regarded as a loan by the shipper to the shipowner, whether on security of the freight or not (*c*), it is repayable, if freight to that amount be not due from the shipper, whether the ship be lost or not, and it cannot be insured by either party (*d*).

(*s*) *Allison* v. *Bristol Co.*, *vide supra*, at p. 229; *Hicks* v. *Shield* (1857), 7 E. & B. 633; *Jackson* v. *Isaacs* (1858), 3 H. & N. 405, in which the charterer was to deduct cost of insurance from advance freight; *Frayes* v. *Worms* (1865), 19 C. B., N. S. 159, in which it was held that general average on advance freight was to be paid by the charterer. According to *Rodoconachi* v. *Milburn* (1886), L. R. 17 Q. B. D. 316, if the charterer has omitted to insure, he will be liable for such advance freight a second time, if, the ship being lost, he claims as damages the price he would have received for the cargo, had the voyage been completed. This case is now (Oct. 1886) under appeal.

(*t*) *Anonymous Case* (1684), 2 Shower, 283; *De Silvale* v. *Kendall* (1815), 4 M. & S. 37; *Byrne* v. *Schiller* (1871), L. R. 6 Ex. 20, 319; *Saunders* v. *Drew* (1832), 3 B. & Ad. 445. For the explanation of this rule, which is peculiar to English law, and probably arose from the long voyages of the East India trade, see Brett, J., in L. R. 1 App. C. 223.

(*x*) *G. Indian Peninsular R. Co.* v. *Turnbull* (1885), 53 L. T. 325.

(*z*) *Ex parte Nyholm. In re Child* (1873), 29 L. T. 634.

(*a*) *How* v. *Kirchner* (1857), 11 Moore, P. C. 21; *Kirchner* v. *Venus* (1859), 12 Moore, P. C. 361; *Tamvaco* v. *Simpson* (1866), 19 C. B., N. S. 453, see the judgment of Willes, J.; *Ex parte Nyholm. In re Child* (1873), 29 L. T. 634, and see Articles 150, 155, 157, *post*.

(*b*) *Tanner* v. *Phillips* (1872), 42 L. J. Ch. 125; *The Salacia* (1862), 32 L. J. Adm. 43, and see Article 147, s. vii.

(*c*) It may not involve a set-off against the freight.

(*d*) *Watson* v. *Shankland* (1873), L. R. 2 H. L. Sc. 304; *Manfield* v. *Maitland* (1821), 4 B. & Ald. 582; *Allison* v. *Bristol Marine Insurance Co.* (1876), L. R. 1 App. C. 229, 253.

Case 1.—Goods were shipped under a charter "to be delivered on being paid freight £5 per ton delivered . . . Cash for ship's disbursements to be advanced to the extent of £300, free of interest, but subject to insurance . . . The freight to be paid on unloading and right delivery of cargo as follows, in cash, less two months' interest at 5 per cent., and if required £300 to be paid in cash on arrival at port of loading, less two months' interest." D., agent for the charterer, C., advanced £300; the ship was lost on the voyage, and C. claimed £300 from A., the shipowner, as a loan. *Held*, that the charter, and the provision for insurance, shewed conclusively that the advance was for freight, and not for a loan, and as such could not be recovered, though the ship was lost (*e*).

Case 2.—A ship was chartered, "freight to be paid thus: £1200 to be advanced the master by freighter's agents at X., and to be deducted with 1¼ per cent. commission on the amount advanced, and cost of insurance, from freight on settlement thereof, and the remainder on right delivery of the cargo at port of discharge, in cash . . . the master to sign bills of lading at any current rate of freight required without prejudice to the charter, but not under chartered rates unless the difference be paid in cash." The shippers paid the £1200, and required the master to sign bills of lading under chartered rates, putting off the payment in cash of the difference, £700, by excuses. The ship was lost on the voyage. *Held*, the £1200 could not be recovered back from the shipowners, and the shipowners could recover the £700, the intention being that it should be advance of freight, payable whether the ship was lost or not (*f*).

Case 3.—Goods were shipped under a charter, "Four-fifths of freight calculated on quantity shipped to be advanced and paid in cash in one month from the vessel's sailing from her last port in Great Britain, steamer lost or not lost." The excepted perils did not include the master's negligence. She sailed July 12, and was lost through the negligence of her master on July 19, the loss being known on July 21; on July 26 the freighter paid four-fifths of freight to the charterer. *Held*, that the freighter could recover such payment, as "lost or not lost" only referred to losses by excepted perils, and not to a loss by master's negligence (*g*).

Case 4.—Goods were shipped under a charter, "freight to be paid, half in cash on unloading and right delivery of cargo, and the remainder by bill in London at four months' date. The captain to be supplied with cash for ship's use." Under the last clause, the master drew a bill for £219 on the freighters, which was accepted and paid. The ship was lost on the voyage. *Held*, that the sum of £219 was a loan, repayable by the shipowner whatever the result of the voyage, and consequently not insurable by the charterer (*h*).

Case 5.—Goods were shipped under a charter, "Sufficient cash for ship's disbursements to be advanced, if required, to the captain by charterers (C.) on account of freight at current rate of exchange subject to insurance only." The whole freight was £735. C. advanced at X. £160, being allowed £5 for insurance. C. did not insure the £160. The ship was lost by perils

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(*e*) *Hicks* v. *Shield* (1857), 7 E. & B. 633. See also *Allison* v. *Bristol Insurance Co.*, *vide supra*; and for a curious case of advance freight, see *The Thyatira* (1883), L. R. 8 P. D. 155.

(*f*) *Byrne* v. *Schiller* (1871), L. R. 6 Ex. 20, 319. That the shipowners would have no lien for such a difference without an express agreement, is shewn by *Gardner* v. *Trechmann* (1884), 15 Q. B. D. 154.

(*g*) *G. Indian Pen. R. Co.* v. *Turnbull* (1885), 53 L. T. 325.

(*h*) *Manfield* v. *Maitland* (1821), 4 B. & Ald. 582.

not excepted, and C. claimed to recover £8500, the price for which the goods were sold "to arrive," less £575 balance of freight. The shipowners claimed to deduct £735, the whole freight. *Held*, they were entitled to do so (*i*).

Article 138.—*Back Freight.*

When the ship is either ready to deliver cargo at the port of destination, or is prevented by excepted perils from reaching such port (*j*), but the merchant does not take delivery or forward instructions within a reasonable time, the master, if he does not tranship in the interests of the shipowner (*k*), has the power and duty to deal with the cargo in the owner's interest at the owner's expense. He may land and warehouse it, or if this is impracticable, may carry it in his ship, or forward it in another ship, to such place as may be most convenient for its owner, and can charge the owner with remuneration for and expenses of such carriage under the name of "*back freight*" (*l*).

Case.—Oil was shipped from X. to Havre, under a bill of lading, "Goods to be taken out within twenty-four hours after arrival." On reaching Havre the landing of oil was forbidden; attempts to land it at other ports near failed. The ship returned to H., transhipped the oil into lighters in the harbour, unloaded the rest of the cargo, reshipped the oil, and brought it back to L. The shipper made no request for the delivery of the goods at Havre. *Held*, that the shipowner was entitled to the freight and expenses of the return journey to X., as well as the original freight from X. to H. (*l*).

Dead Freight.

See Article 161, *post.*

(*i*) *Rodoconachi* v. *Milburn* (1886), 17 Q. B. D. 316. If C. had insured, he would have recovered £160 from the underwriters, the benefit of which would have gone to A.; C. was not allowed, therefore, to take advantage of his failure to insure, for which A. had paid. This case is now (Oct. 1886) under appeal.

(*j*) *Semble*, that the shipowner can here also recover similar expenses and back freight, incurred in interests of cargo-owner: *vide Notara* v. *Henderson* (1870), L. R. 5 Q. B. 346, and Articles 101, 103. Where the voyage is prevented by its illegality, back freight may be recoverable where such illegality was not known to the shipowner, but not where it was: *Heslop* v. *Jones* (1787), 2 Chit. 550.

(*k*) Article 103.

(*l*) *Cargo ex Argos* (1873), L. R. 5 P. C. 134, settling Lord Mansfield's doubt in *Christy* v. *Row* (1808), 1 Taunt. 300, at p. 314. See Article 126.

Article 139.—*Shipowner's Right to Full Freight.*

The shipowner is entitled to the full freight in the charter or bill of lading:

1. When he delivers the goods at the port of destination (*m*), or is ready to deliver them, but the consignee does not take delivery within a reasonable time (*n*).

2. Where a lump sum as freight has been stipulated for, and he has delivered, or is ready to deliver, some part of such goods (*o*).

3. Where, the necessity of transhipment having arisen, he has transhipped, and so caused the goods to be delivered, even though at a less freight than that originally contracted for (*p*).

4. Where he has been prevented from delivering the goods solely by the default of the freighter, as in refusing to accept delivery at the port of destination (*q*), or in requiring delivery of the goods at an intermediate port (*r*), or in refusing to name a safe port to which the ship can proceed, and enter (*s*).

Case 1.—F. shipped cement under a bill of lading, "Freight to be paid within three days after the arrival of ship before the delivery of any portion of the goods specified in this bill of lading." The vessel arrived, but on the day of arrival a fire accidentally arose which necessitated the scuttling of the ship, and the cement was so acted upon by water as to cease to exist as cement. *Held*, that the master must be ready to deliver before freight was payable, and therefore no freight was due (*t*).

Case 2.—F. shipped petroleum on A.'s ship to be delivered at Havre, to be taken by F. within twenty-four hours of ship's arrival at Havre. At H. the port authorities refused to allow the petroleum to be landed or the ship to come to the ordinary place of discharge in the port. The ship was allowed to anchor in the outer port, and F. could have taken delivery of the petroleum there into lighters. F. made no application of any sort for

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(*m*) Delivery need not be to the consignee, if it is in a manner approved by him: see *Fenwick* v. *Boyd* (1846), 15 M. & W. 632.

(*n*) *Duthie* v. *Hilton* (1868), L. R. 4 C. P. 138, at p. 143; *Cargo ex Argos* (1872), L. R. 5 P. C. 134; and *per* Lord Mansfield, in *Luke* v. *Lyde* (1759), 2 Burr. 883.

(*o*) *Vide*, Article 140.

(*p*) *Shipton* v. *Thornton* (1838), 1 P. & D. 216; *Matthews* v. *Gibbs* (1860), 30 L. J. Q. B. 55, is not inconsistent with this, but turns on specific facts; and see Article 103.

(*q*) *Cargo ex Argos*, *vide supra*.

(*r*) *The Bahia* (1864), B. & L. 292; *Cargo ex Galam* (1863), B. & L. 167; *The Soblomsten* (1866), L. R. 1 Adm. 293; *Luke* v. *Lyde* (1759), 2 Burr. at p. 888.

(*s*) *The Teutonia* (1872), L. R. 4 P. C. 171.

(*t*) *Duthie* v. *Hilton* (1868), L. R. 4 C. P. 138.

the goods to the ship. *Held*, that A. had done all that was required on his part, and was entitled to full freight (*u*).

Case 3.—F. shipped goods from X. to Z. on the French ship *S.* During the voyage, from sea damage, the vessel put into Y. French law requires a "certificate of innavigability" before the voyage could be abandoned. Before the legal process of obtaining this certificate was completed, F. arrested the ship, and obtained the cargo without the master's consent. *Held*, that as the reasonable time allowed the master in which to tranship or repair had not expired, F. had no right to seize the cargo, and was liable for the whole freight (*v*).

Case 4.—C. chartered A.'s ship to carry a cargo from X. to Z. Unknown to A. there was a *Respondentia* bond on the cargo. On the voyage to Z. the ship was stranded at Y., and while there the cargo was seized by the bondholder and sold, C. not interfering. *Held*, that as A. was prevented from carrying to Z. by the act of C., he was entitled to full freight to Z. (*x*).

Case 5.—A German vessel was chartered to proceed to Y. for orders, and thence to a safe port as ordered in Great Britain, or on the continent between Havre and Hamburg. On reaching Y. the ship was ordered to Dunkirk, then safe, but before the ship's arrival there, owing to war between France and Germany the vessel could not safely enter, and accordingly proceeded to Dover. The charterers required her to proceed to Dunkirk, and refused to name any other port, or to pay freight at Dover.—*Held*, that as the charterers had failed to name a port safe on arrival, the ship was discharged from the necessity of completing her voyage, and the shipowner was entitled to full freight at Dover (*y*).

Article 140.—*Lump Freight.*

Lump freight is a gross sum stipulated to be paid for the use of the entire ship; it will, therefore, be payable if the shipowner be ready to perform his contract, though no goods are shipped, or though part of the goods shipped are not delivered. If any goods are shipped, some must be delivered, to entitle the shipowner to lump freight (*z*).

(*u*) *Cargo ex Argos* (1873), L. R. 5 P. C. 134.

(*v*) *The Bahia* (1864), B. & L. 292. If the goods owner tenders full freight at an intermediate port, the master is bound to deliver; *The Patria* (1863), L. R. 3 Adm. 436. *Blasco* v. *Fletcher* (1863), 14 C. B., N. S. 147, turns on a special authority from the master.

(*x*) *Cargo ex Galam* (1863), B. & L. 167. See also *The Soblomsten* (1866), L. R. 1 Adm. 293.

(*y*) *The Teutonia* (1872), L. R. 4 P. C. 171.

(*z*) *The Norway* (1865), 3 Moore, P. C., N. S. 245; *Robinson* v. *Knights* (1873), L. R. 8 C. P. 465; *Merchant Shipping Co.* v. *Armitage* (1873), L. R. 8 C. P. 469; L. R. 9 Q. B. 99. Dr. Lushington in *The Norway*, 12 L. T. 56, had expressed the opinion that where short delivery of goods was not due to excepted perils, the freighter might deduct *pro rata* freight for the goods not delivered, though he could not deduct their value, nor could he deduct the freight if the short delivery were due to excepted perils. The Judicial Committee, reversing him on the question of

Case.—A ship was chartered to load a full cargo, proceed to Z. and there deliver the same on being paid "a lump freight of £315." On the voyage, part of the cargo, properly loaded, was lost through perils of the sea. *Held*, that on delivery of the remainder, the full freight of £315 was payable (*a*).

Article 141.—*Full freight for delivery of damaged Goods, or for short delivery.*

The shipowner will be entitled to full freight:

1. If he is ready to deliver in substance at the port of destination the goods loaded, though in a damaged condition. The freighter will not be entitled to make a deduction from the freight for the damage, but will have a separate cause of action for it, if it was not caused solely by excepted perils, or by the vice of the goods themselves. The question is whether the substance delivered is identical with the substance loaded, though it may have deteriorated in quality (*b*).

Case 1.—Coal shipped under a charter was by the negligence of the master so deteriorated in quality as not to be worth its freight. The charterer therefore abandoned it to the shipowner and claimed to be discharged from freight. *Held*, he was not entitled to abandon, and was liable for the whole freight; his remedy being by cross-action (*c*).

Case 2.—Bricks were shipped under a charter; by the master's negligence they arrived as brickdust. *Held*, the freighter was liable for the full freight, and had his remedy by cross-action (*d*).

2. The shipowner is entitled to full freight, though he delivers less goods than the quantity named in the bill of

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fact, held that the short delivery was due to excepted perils, but also said: "We do not mean to express an opinion that even if the jettison and sale had been attributable to the negligence of the master there ought to be a deduction. Perhaps in this case, the proper remedy of the shipper would have been by a cross-action." Coleridge, C.J., expresses a doubt whether this is correct in *Merchant Shipping Co.* v. *Armitage*, at L. R. 9 Q. B. p. 107.

(*a*) *Robinson* v. *Knights*, *vide supra*.

(*b*) *Dakin* v. *Oxley* (1864), 15 C. B., N. S. 646, *per* Willes, J., at pp. 664, *et seq.*; *Melhuish* v. *Garrett* (1858), 4 Jur., N. S., 943; *Shields* v. *Davis* (1815), 6 Taunt. 65.

(*c*) *Dakin* v. *Oxley*, *vide supra*.

(*d*) *Melhuish* v. *Garrett*, *vide supra*. The distinction between this case and that of *Duthie* v. *Hilton* (1868), L. R. 4 C. P. 138, where cement was affected by water, so as to become a solid mass, and it was held that no freight was due, is, I suppose, that the substance there was something different from the substance loaded, though the brickdust and the solid cement would seem equally useless to the shipper. Willes, J., in *Dakin* v. *Oxley*, at p. 667, puts the question thus: "What was the thing for the carriage of which freight was to be paid, and whether that thing, or any and how much of it has substantially arrived."

lading, if he delivers all that were loaded (*e*). Statements of contents or weight contained in the bill of lading are binding against the shipper or consignee for the purposes of freight, if the goods are delivered as received (*f*).

Case 1.—A bill of lading shewed 300 tons to be shipped; only 217 tons were delivered. On proof that no more had been loaded; *held*, that the whole freight was due (*g*).

Case 2.—A ship was chartered to pay freight at 7s. per quarter delivered to consignee, but if any part was delivered damaged, freight should be paid at captain's option, either on invoice quantity loaded as per bill of lading, or half freight on damaged portion. Eighty quarters were damaged, and the captain elected to receive full freight on the bill of lading amount. This was "2368 quarters, quantity and quality unknown," but only 2266 quarters were delivered. *Held*, that the shippers were liable to pay on the bill of lading amount (*h*).

Article 142.—*Freight* pro rata *for short delivery.*

If the shipowner, contracting to load a full cargo, only loads and carries part of it (*i*), or if, having loaded a full cargo, he only delivers part of it, he will, in the absence of a stipulation for lump freight (*k*), only be entitled to freight *pro rata* in the quantity delivered; and the freighter can counterclaim for short delivery, not solely caused by excepted perils, or the vice of the goods themselves (*l*).

Case.—A ship was chartered to proceed to X. and there load a complete cargo of hemp, and proceed to Z. and deliver the same on being paid freight at £5 per ton. A complete cargo was not loaded. *Held*, that the shipowner could recover freight *pro rata* on the quantity delivered, and the freighter had a cross-action for failure to load a complete cargo (*m*).

(*e*) *Davidson* v. *Gwynne* (1810), 12 East, 381; *Blanchet* v. *Powell* (1874), L. R. 9 Ex. 74; *Meyer* v. *Dresser* (1864), 16 C. B., N. S. 646; *The Norway* (1865), 3 Moore, P. C., N. S. 245; *Jessel* v. *Bath* (1867), L. R. 2 Ex. 267.

(*f*) *Tully* v. *Terry* (1873), L. R. 8 C. P. 679. See also *Covas* v. *Bingham* (1853), 2 E. & B. 836.

(*g*) *Blanchet* v. *Powell*, *vide supra*.

(*h*) *Tully* v. *Terry*, *vide supra*. See also *Jessel* v. *Bath* (1867), L. R. 2 Ex. 267.

(*i*) *Ritchie* v. *Atkinson* (1808), 10 East, 295.

(*k*) Willes, J., suggests in *Dakin* v. *Oxley*, *vide supra*, an exception if the delivery of the whole cargo is made a condition precedent to the payment of any freight; but such a case is believed never to occur in practice.

(*l*) *Dakin* v. *Oxley* (1864), 15 C. B., N. S. at p. 665; *The Norway* (1865), 3 Moore, P. C., N. S. 245; *Spaight* v. *Farnworth* (1880), L. R. 5 Q. B. D. 115; as to French law, see *Blanchet* v. *Powell* (1874), L. R. 9 Ex. 74; as to Prussian law and usage, see *Meyer* v. *Dresser* (1864), 16 C. B., N. S. 646.

(*m*) *Ritchie* v. *Atkinson* (1808), 10 East, 295.

Article 143.—*Freight* pro rata *for delivery short of place of destination.*

Where the shipowner delivers the goods to the merchant short of the port of destination, he can only claim freight proportional to the amount of voyage completed, known as freight *pro rata itineris peracti*, or *freight pro rata*, if an express or implied agreement to that effect exists with the merchant (*n*).

Such an agreement will not be implied from the mere fact that the merchant receives his goods at the request of the shipowner at an intermediate port (*o*).

To justify a claim for *pro rata* freight there must be such a voluntary acceptance of the goods by their owner, at a point short of their final destination, or such a dealing, or neglect to deal with them there, as to raise a fair inference that the further carrying of the goods (the shipowner having a right to carry them further), was intentionally dispensed with by the goods owner (*p*).

Thus where the goods are arrested, and the goods owner knowing of their arrest, takes no step to release them, and allows them to be sold, a claim for *pro rata* freight arises (*q*). But where the shipowner has no longer a right to carry on, as where he abandons the ship and cargo, or where he delays repairs or transhipment beyond a reasonable time, the goods

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(*n*) *Osgood* v. *Groning* (1810); 2 Camp. 466; *The Newport* (1858), Swabey, 335; *Luke* v. *Lyde* (1759), 2 Burr. 882; *Dakin* v. *Oxley* (1864), 15 C. B., N. S., 646, at p. 665.

(*o*) *The Soblomsten* (1866), L. R. 1 Adm. 293; *Cook* v. *Jennings* (1797), 7 T. R. 381; *Metcalf* v. *Brit. Iron Works* (1877), L. R. 2 Q. B. D. 423; *Thornton* v. *Fairlie* (1818), 8 Taunt. 354.

(*p*) *Osgood* v. *Groning, vide supra*; *The Newport, vide supra*; *Christy* v. *Row* (1808), 1 Taunt. 299; *Liddard* v. *Lopes* (1809), 10 East, 526; *Mitchell* v. *Darthez* (1836), 2 Bing. N. C. 555.

(*q*) *The Soblomsten, vide supra:* Lord Mansfield's remark in *Luke* v. *Lyde, vide supra*, at p. 888, that "if the merchant abandons all, he is excused freight, and he may abandon all though they are not all lost," must be read with the comments of Willes, J., in *Dakin* v. *Oxley, vide supra*, at p. 665, who substitutes "decline to accept" for "abandon;" in which case the goods owner, by declining to accept his goods short of the place of destination at *pro rata* freight will compel the master either to carry or send them on at the full freight (see Articles 103, 138, 139), or to give them up to their owner there, without requiring any freight.

owner, who receives his goods, will not thereby give the shipowner any claim for freight *pro rata* (*r*).

A sale by the master, though justifiable in the interests of the cargo, gives him no claim for *pro rata* freight, if the goods owner has not been consulted, whether such consultation was possible or not (*s*), or having been consulted, has not acquiesced (*t*).

Case 1.—A ship was chartered from X. to Z., but was prevented from reaching Z. by "restraints of princes." The consignees requested the master to deliver at Y. into their lighters, and he delivered part of the cargo there. *Held*, that freight *pro rata* was due for the part of the cargo delivered at Y. (*u*).

Case 2.—A chartered vessel on the voyage became disabled, and was on October 2 towed into an English port, where she and the cargo were arrested in a salvage suit on October 7. The master took the necessary steps to defend the suit, but on October 24 abandoned the vessel; the owners of the cargo had been informed of the suit, and of the probable sale of the cargo, but gave no instructions. The cargo was sold by the order of the Court. *Held*, that the owners of the cargo by their inaction had waived their right to have the voyage completed, at a time when the master had not lost his right to tranship, and that the cargo owners were therefore liable to pay *pro rata* freight (*x*).

Case 3.—A ship was chartered to sail from X. to Z.; owing to restraint of princes she was unable to proceed, and put back to Y.; the charterers refused to accept the cargo at Y.; the shipowner unloaded it after notice to the charterers, and it was sold by consent without prejudice to questions in dispute. *Held*, that there was no liability in the charterers to pay freight *pro rata* (*y*).

Case 4.—A ship was chartered to proceed to Taganrog and deliver cargo. Owing to ice in the Sea of Azof she could get no further than Kertch, 300 miles by sea from T. and would have had to wait till the spring to complete her voyage. The captain proposed to discharge the cargo, the consignees objected. The captain delivered the cargo to the custom-house at

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(*r*) *The Kathleen* (1874), L. R. 4 Adm. 269; *The Cito* (1881), L. R. 7 P. D. 5 (C.A.); *The Leptir* (1885), 52 L. T. 768.

(*s*) *Vlierbom* v. *Chapman* (1844), 13 M. & W. 230; *Hopper* v. *Burness* (1876), L. R. 1 C. P. D. 137; *Acatos* v. *Burns* (1878), L. R. 3 Ex. D. 282 (C.A.).

(*t*) *Hill* v. *Wilson* (1879), 4 C. P. D. 329. To render himself liable to *pro rata* freight, the goods owner, having had an option of having the goods sent on to their destination, or of accepting them at the intermediate port, must accept the goods at the intermediate port: *Hill* v. *Wilson*, at p. 335. See also *Blasco* v. *Fletcher* (1863), 14 C. B., N. S. 147. *Semble*, however, that while the captain must protect the interests of the goods, he should also protect the interests of the ship, and should not let the goods go without the payment of *pro rata* freight.

(*u*) *Christy* v. *Row* (1808), 1 Taunt. 299.

(*x*) *The Soblomsten* (1866), L. R. 1 Adm. 293. *Semble*, the shipowner was entitled to full freight, as the master, being entitled to tranship, was prevented by the default of the cargo owners; see *The Bahia* (1864), B. & L. 292. The case cited is distinguishable from such cases as *Hopper* v. *Burness* (1876), L. R. 1 C. P. D. 137, as there the sale was by the master; here the master was in no way responsible for it.

(*y*) *Liddard* v. *Lopes* (1809), 10 East, 526.

Kertch, claiming a lien on it for freight; the custom-house gave it up to the consignees, who gave the captain a receipt for it, but declined to pay freight. *Held*, that the shipowner was not entitled to full freight, for he had not completed the voyage, nor to *pro rata* freight, for there was no express or implied contract to pay it (*z*).

Case 5.—C. chartered a ship to carry a cargo from X. to Q. and deliver it; to load another cargo at Q. and carry it to Z., the freight for the voyage out and home, payable on final delivery of the cargo, to be £1300. The ship reached Q. and discharged; she then loaded a cargo and proceeded to Z., but on the voyage suffered great damage and put into Y., where the ship and one-third of the cargo were abandoned. The captain left for England, leaving instructions with the vice-consul to forward the remainder of the hides to Z., and they were forwarded. *Held*, that C. was liable to pay freight *pro rata* from Q. to Y.; that he was not liable for freight from X. to Q.; nor could the shipowner claim freight from Y. to Z., as the vice-consul and captain in their combined action had acted as agents of C. and not of the shipowner (*a*).

Case 6.—A ship on a voyage to Z. was, owing to the perils of the sea, abandoned by her crew. She was found derelict by another ship, which brought her into an English port. *Held*, that upon satisfying the cargo's liability to the salvors the cargo owners were entitled to their goods without payment of any freight, the contract of affreightment being at an end by justifiable abandonment of the ship, and the shipowner having therefore no right to carry on by transhipment (*b*).

Case 7.—A ship, *S.*, on a chartered voyage met with storms, and signals of distress were made to the ship *R.* The *S.*'s master and crew went on board the *R.*, but without taking clothes or baggage; on seeking to return to the *S.* they were not allowed; the master of the *R.* sent some of his own crew on board the *S.* and the *S.*'s crew helped to navigate the *R.* *Held*, that there was no such abandonment as put an end to the contract of carriage, (as there was either no abandonment or an unjustifiable one); that the shipowners were therefore entitled at least to *pro rata* freight, if the consignees required delivery of the cargo (*c*).

Case 8.—A vessel, chartered to carry coals from X. to Z., by perils of the sea required repairs at Y.; to effect this the captain justifiably sold part of the cargo at a higher price than he could have obtained in Z. *Held*, that as the cargo owner had not acquiesced in the sale no claim for *pro rata* freight to Y. could be made against him (*d*).

Note.—*Hopper* v. *Burness* (*d*), reconciles the cases of *Baillie* v. *Moudigliani* (*e*) and *Hunter* v. *Prinsep* (*f*), showing that mere

(*z*) *Metcalfe* v. *Britannia Ironworks Co.* (1877), L. R. 2 Q. B. D. 423. See also *Castel* v. *Trechmann* (1884), 1 C. & E. 276.

(*a*) *Mitchell* v. *Darthez* (1836), 2 Bing. N. C. 555.

(*b*) *The Cito* (1881), L. R. 7 P. D. 5: see also *The Kathleen* (1874), L. R. 4 Adm. 269; *Curling* v. *Long* (1797), 1 B. & P. 634. On rights of underwriters to freight, see *Hickie* v. *Rodocanachi* (1855), 4 H. & N. 455; *Miller* v. *Woodfall* (1857), 8 E. & B. 493.

(*c*) *The Leptir* (1885), 52 L. T. 768. *Semble*, that if the owners were willing to tranship and carry on, the consignees were not entitled to their goods without full freight being paid. In this case the suit was by salvors; the shipowners put in no appearance, and would seem to have abandoned all intention of carrying on, in which case they would have no right to any freight.

(*d*) *Hopper* v. *Burness* (1876), L. R. 1 C. P. D. 137.

(*e*) (1785), Park on Insurance, p. 90.

(*f*) *Hunter* v. *Prinsep* (1808), 10 East, 378.

receipt of the produce of the sale of goods at an intermediate port by their owner cannot be treated as the receipt of the goods themselves, so as to give rise to a claim to freight *pro rata*. Brett, J., puts the cargo owner's position thus:—

(1.) If the goods are sold for a higher price at the intermediate port, than they would fetch at the port of destination, he can treat the proceeds as a forced loan, and claim them at once without paying *pro rata* freight.

(2.) If they are sold for a smaller price, he can similarly treat the actual proceeds as a forced loan (*g*), but he can also claim an indemnity for the difference of the price, if, but not unless, the ship arrives at the port of destination (*h*), and he must then deduct the freight that would have been due on the delivery of the goods there if carried.

Article 144.—*Amount of Freight.*

Freight is payable according to the express stipulations of the charter or bill of lading (*i*), or, failing them, according to the custom of the trade or port (*j*).

Thus, if the goods shipped belong to the shipowner, and therefore no freight is due from him for their carriage, but a freight whether substantial (*k*), or nominal (*l*), is inserted in the bill of lading as payable, that freight will be payable by assignees of the bill of lading or persons taking delivery under it, other than the owner or his agents.

Case 1.—E., master of a ship owned by A., carried a cargo of wheat "on owner's account," purchased on the credit of R. to whom E. gave bills of lading for "wheat shipped on owner's account, deliverable to P.'s order at freight of 1*s.* per ton," and bills of exchange for the price, which A. accepted. A. had mortgaged his ship to M. A. sold the cargo *in transitu* to K., the sale note running "as cargo is coming on ship's account, freight to be computed at £2 15*s.* per ton." A. indorsed the bill of lading, which he had received from P. on his acceptance of the bills of exchange, to K. with a note:

(*g*) This had been doubted by Pollock, C.B., in *Atkinson* v. *Stephens* (1852), 7 Ex. 567.

(*h*) *Atkinson* v. *Stephens*, *vide supra*.

(*i*) There may be an express agreement for the payment of freight outside that in the bill of lading: *Hedley* v. *Lapage* (1816), Holt, 392.

(*j*) See Article 8, pp. 17, 18.

(*k*) *Wequelin* v. *Cellier* (1873), L. R. 6 H. L. 286.

(*l*) *Keith* v. *Burrows* (1877), L. R. 2 App. C. 636; *Brown* v. *North* (1852), 8 Ex. 1; *Turner* v. *Trustees of Liverpool Docks* (1851), 6 Ex. 543. The shipowner may, however, have a lien as unpaid vendor for the balance of the price representing what would be freight, if the shipowner and original goods owner were different: *Swan* v. *Barber* (1879), L. R. 5 Ex. D. 130.

"The freight assigned is at the rate of £2 15*s.* per ton, and not the nominal amount of 1*s.* per ton." On ship's arrival, M., as mortgagee, took possession, and claimed freight at £2 15*s.* from K., who refused to pay more than 1*s.* *Held*, that M. was only entitled to the freight named in the bill of lading, the larger sum being in reality part of the purchase-money, and no claim of *quantum meruit* being possible in face of the express contract (*m*).

Case 2.—D., as agent for C., purchased and paid for rice to be carried to Z. in C.'s ship. The rice was then shipped under bills of lading, "to be delivered to D. or assigns, freight for the said goods at £4 5*s.* per ton." C. assigned the freight to M. during the voyage. *Held*, that on arrival D. was bound to pay to M. the freight in the bill of lading, and was not entitled to set off the price of the rice due from C. to himself (*n*).

Where freight is payable on goods according to their weight or measurement, and owing to swelling (*o*), expansion after hydraulic pressure (*p*), or shrinkage, the same goods are larger or smaller at the port of destination than when loaded, freight will be payable in the absence of express stipulation or usage on the amount shipped, and not on the amount delivered (*q*).

Case 1.—A ship was chartered to load a full and complete cargo and deliver on being paid freight at £2 7*s.* 6*d.* per ton. The bill of lading showed 2664 quarters shipped; owing to heat the corn swelled, and 2785 quarters were delivered. *Held*, that freight was payable on the quantity shipped, and not on its measurement at the port of discharge (*r*).

Case 2.—Charter to load and deliver a full cargo of cotton on being paid freight at the rate of "£3 15*s.* per ton of 50 cubic feet delivered" on right delivery of cargo. The cotton was hydraulically pressed before shipment, and consequently expanded on delivery. *Held*, apart from a custom to pay by the measurement of the port of loading, that freight was payable on the quantity delivered as loaded, and not on the measurement after discharge (*p*).

So where freight is payable according to quantity or

(*m*) *Keith* v. *Burrows* (1877), L. R. 2 App. C. 636.

(*n*) *Weguelin* v. *Collier* (1873), L. R. 6 H. L. 286.

(*o*) *Gibson* v. *Sturge* (1855), 10 Ex. 622; *Spaight* v. *Farnworth* (1880), L. R. 5 Q. B. D. 115, *per* Bowen, L.J., at p. 118.

(*p*) *Buckle* v. *Knoop* (1867), L. R. 2 Ex. 333.

(*q*) *Dakin* v. *Oxley* (1864), 15 C. B., N. S. 646, *per* Willes, J., pp. 665, 666.

(*r*) *Gibson* v. *Sturge*, *vide supra*. To meet this, the clause "freight payable according to net weight delivered," was sometimes introduced into shipping documents; and in *Coulthurst* v. *Sweet* (1866), L. R. 1 C. P. 649, under a bill of lading with that clause, the shipowner was *held* not entitled to demand freight on the weight named in the bill of lading, or to require the consignee to pay the expense of weighing. Willes, J., said, "In the absence of any custom to govern the matter, the person who wants to ascertain the quantity must incur the trouble and expense of weighing." In *Spaight* v. *Farnworth*, *vide supra*, the words were "freight payable on timber on intake measure of quantity delivered." This was held to mean on the quantity delivered taken at the actual measures of the port of shipment. A more complicated clause is found in *Tully* v. *Terry* (1873), L. R. 8 C. P. 679.

measurement, the method of weighing or measuring, in the absence of express indication or custom to the contrary (*t*), must be determined by the custom of the port of loading (*u*).

Case 1.—A ship was chartered to carry a cargo of not less than 1000 tons weight and measurement. *Held*, that the proportions of weight and measurement goods were to be determined by the custom of the port of loading, and not of the port of discharge (*x*).

Case 2.—A ship was chartered, "freight at the rate of 35*s.* per 180 English cubic feet taken on board, as per Gothenburg custom." The cargo was not measured at the Baltic port of shipment; but, on arrival at Hull, was there measured for the payment of freight. *Held*, that it should be measured according to the G. custom, and not the custom of the port of discharge (*y*).

Note.—For special clauses as to freight, where the cargo is to consist of several articles at various rates, see:

Capper v. *Forster* (1837), 3 Bing. N. C. 938.

Cockburn v. *Alexander* (1848), 6 C. B. 791.

Warren v. *Peabody* (1849), 8 C. B. 800.

Southampton Co. v. *Clarke* (1870), L. R. 6 Ex. 53.

For special phrases, *e.g.*:—

Freight in full for the voyage, see *Sweeting* v. *Darthez* (1854), 14 C. B. 538.

Highest freight paid on same voyage: *Gether* v. *Capper* (1856), 18 C. B. 866.

Alternative freights: *Gibbens* v. *Buisson* (1834), 1 Bing. N. C. 283. *Fenwick* v. *Boyd* (1846), 15 M. & W. 632.

(*t*) *Nielsen* v. *Neame* (1884), 1 C. & E. 288, where freight was to be paid "45*s.* per St. Petersburg standard hundred," and the method of calculating St. P. standard hundreds used at the port of discharge was taken, on evidence of a custom to that effect. See also *Bottomley* v. *Forbes* (1838), 5 Bing. N. C. 121.

(*u*) *Pust* v. *Dowie* (1865), 34 L. J. Q. B. 127; *The Skandinav* (C.A.) (1881) 51 L. J. Ad. 93.

(*x*) *Pust* v. *Dowie*, *vide supra*, and see Article 46, note, *ante*.

(*y*) *The Skandinav*, *vide supra*. The two cases of *Moller* v. *Living* (1811), 4 Taunt. 101, and *Geraldes* v. *Donison* (1816), Holt. 346, are not inconsistent with this. In *Moller* v. *Living* there was a contract to pay freight at £14 per last on a quantity stated in the bill of lading as "100 lasts in 2092 bags." The voyage was from D. to L. There were 2092 bags on board, and they contained 100 lasts by L. measure but not by D. measure: *held*, that the specific description in the bill of lading negatived any question of different measures, and freight was payable on 100 lasts. If the description had been simply "100 lasts," the question would arise, and it did in *Geraldes* v. *Donison*, *vide supra*, where, following an usage of merchants, it was *held* that the bill of lading weight was subject to check by weighing at the port of delivery; the Court there suggesting that the clause "weights unknown" in the bill of lading introduced the custom. But in *Tully* v. *Terry* (1873), L. R. 8 C. P. 679, that clause was held not to interfere with the captain's right under the charter to be paid freight on the invoice quantity in the bill of lading; the object of the clause being explained to be "to protect the captain against any mistake that might occur in the invoice quantity in the bill of lading, in case of alleged short delivery, or deterioration, not caused by his default." *Vide supra*, Article 52.

Article 145.—*Freight; when payable.*

When freight is payable on delivery of the cargo, payment and delivery are concurrent acts. The merchant is not entitled to have the goods unless he is ready to pay the freight. The shipowner is not entitled to the freight, unless he is ready to deliver the cargo (*z*). The master is entitled to refuse to discharge the cargo, unless freight is paid for each portion as delivered (*a*); *semble*, also that the merchant need only pay freight *pari passu* with delivery.

Note.—Freight is usually payable at the financial centre; the stipulations as to the time of its payment vary considerably in practice, but in very many cases freight is payable at the port of loading, sometimes on delivery of bills of lading, sometimes with fourteen days' credit. In the former case, where the bill of lading contains a clause "freight paid in London," the delivery of the bill of lading acts as a receipt for the freight.

Article 146.—*Time Freights in Charters.*

Where freight is payable by time it is earned at the end of each period specified, unless a contrary intention appears (*b*), although it may only be payable under the charter at longer intervals, and the ship is lost before the longer interval expires (*c*).

In the absence of express agreement it is payable during the ship's detention by blockade (*d*), embargo (*d*), bad weather (*d*), or repairs (*c*).

Note.—Time charters now usually contain clauses as follows:—"In the event of loss of time from deficiency of men or

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(*z*) *Paynter* v. *James* (1867), L. R. 2 C. P. 349; *Yates* v. *Railton*; *Tate* v. *Meek*; *Yates* v. *Mennell* (1818), 2 Moore, 278–297; *Duthie* v. *Hilton* (1868), L. R. 4 C. P. 138.

(*a*) *Black* v. *Rose* (1864), 2 Moore, P. C., N. S. 277. *Brown* v. *Tanner* (1868), L. R. 3 Ch. 597, which decides that the freight under a charter is not due under the contract till all the cargo is delivered, and which turns partly on the special words "freight to be collected by the charterers," would not prevent the master from claiming his lien on each part of the cargo.

(*b*) As it did in *Gibbon* v. *Mendez* (1818), 2 B. & A. 17.

(*c*) *Havelock* v. *Geddes* (1809), 10 East, 555.

(*d*) *Moorsom* v. *Greaves* (1811), 2 Camp. 626.

stores, break down of machinery, or damage preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease till she be again in an efficient state to resume her service." . . . "Should the vessel be lost without being heard of hire shall cease to be due fifteen days after she left her last port." Some few charters contain a guarantee by the shipowner that the passage shall not exceed a certain time. Whether a "month" in charters is lunar or calendar must depend upon the usage of the trade or port, in the absence of express stipulation, which is usually that the month shall mean thirty days, and is generally inserted. Thus, in 1863, in *Turner* v. *Barlow* (*e*), Erle, C.J., held that "month" = lunar month, except in mercantile transactions in the City of London, when it meant calendar month; and in *Jolly* v. *Young* (*f*), it was held that month = calendar month. Under a clause to pay freight per month, and at the same rate for any part of a month, Denman, J., following *Commercial S. S. Co.* v. *Boulton* (*g*), held that part of a day must be reckoned as a whole day (*h*).

Article 147.—*Freight; to whom payable.*

To whom freight is payable depends on the terms of the contract of affreightment, or, if no person is named therein, on the person with whom the contract was made, to whom or to his agent, freight is payable, subject to any subsequent dealings, as assignment of the freight or mortgage of the ship.

It may be payable to:—

1. The shipowner (see p. 238).
2. The master (see p. 238).
3. The broker (see p. 239).
4. A third party (see p. 239).
5. The charterer (see p. 239).
6. An assignee of the freight (see p. 242).
7. A mortgagee of the ship (see p. 242).

Note.—Freight payable in London is usually payable to the loading broker of the ship or line; abroad, where the vessel is one of a line, to its branch house or its agents; in other cases, if no instructions are contained in the charter or bills of lading,

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(*e*) 3 F. & F. 949.
(*f*) (1794), 1 Esp. 187.
(*g*) (1875), L. R. 10 Q. B. 346.
(*h*) *Angier* v. *Stewart* (1884), 1 C. & E. 357.

to the captain or the agent he appoints. In France all freight is frequently payable to the general consignee of a ship, who is quite distinct from the broker.

I. The Shipowner.

I. Where freight is due from the charterer under a charter, or from the shipper, under a bill of lading where there is no charter, the shipowner, in the absence of express stipulation, is *primâ facie* entitled to receive the freight (*e*). He may give authority to collect such freight to any person he pleases (*f*).

The loading broker (where freight is payable at the port of loading), and the master, when freight is payable on delivery, have ordinarily authority from the shipowner to collect freight (*f*), and payment to either of them will be good payment, discharging the shipper or consignee, unless the owner has given the shipper or consignee notice not to pay either of them (*g*), or unless there is any custom of the trade or port to the contrary. Payment to the master before freight is due will be treated rather as an advance to the master than as a prepayment of freight (*h*).

II. The Master.

II. The master may be entitled to sue in person for freight:

(1.) Where the express contract was made with him (*i*).

(2.) Where a contract to pay freight to him is found as a fact from the consignee's, or some other person's taking delivery of the goods (*k*).

But the master who receives freight from consignees has usually no right to retain it against his owner, for in the

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(*e*) *Smith* v. *Plumer* (1818), 1 B. & A. 575, at p. 581; *Atkinson* v. *Cotesworth* (1825), 3 B. & C. at p. 649.

(*f*) *The Edmond* (1860), Lush. 57.

(*g*) *Atkinson* v. *Cotesworth*, *vide supra*.

(*h*) *Smith* v. *Plumer*, *vide supra*.

(*i*) As in *Seeger* v. *Duthie* (1860), 8 C. B., N. S. at p. 56; *Shields* v. *Davis* (1815), 6 Taunt. 65.

(*k*) *Brouncker* v. *Scott* (1811), 4 Taunt. 1. The master cannot in such a case sue for demurrage, *S. C.* As to the effect of taking delivery, *vide post*, Article 149.

absence of express agreement or statutory procedure (*l*), the master has no lien for wages, or advances made abroad on ship's account, on either ship or freight (*m*).

III. The Broker.

III. The broker, who has acted as loading broker to the ship (*o*), usually collects the freight he has engaged. Payment to him in the absence of any express notice not to do so will usually discharge the person paying.

IV. A third Person.

1. Where freight is made payable by the charter or bill of lading to a third person he can only sue in the name of the shipowner, but payment to the shipowner, apart from such a suit, will not discharge the person paying, unless the third person was only to receive payment as agent for the shipowner (*p*).

2. Payment to a person entitled to receive the beneficial produce of a contract to pay freight will absolve the payer (*q*); thus payment of freight to the obligee under a bottomry bond binding ship and freight (*r*), or payment into the Court of Admiralty, by the monition of the Court in a suit *in rem* against ship and freight by an obligee of a bottomry bond (*s*), are bars to an action for freight by the shipowner.

V. Charterer.

Where a ship is under charter and goods are shipped by third persons under bills of lading signed by the master, the

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(*l*) Under 24 Vict. c. 10. s. 10. Admiralty Court Act, 1861.

(*m*) *Smith* v. *Plumer* (1818), 1 B. & A. 575. So also if freight is made payable to agent of ship's husband, he cannot retain it as against owners in satisfaction of a debt due to him by ship's husband: *Walshe* v. *Provan* (1853), 8 Ex. 843. Where a master sues for a freight on a charter a debt due to the charterer from the shipowner cannot be set off against the master's claim; *sed quaere* now; *Isberg* v. *Bowden* (1853), 8 Ex. 852.

(*o*) See Article 16 b., note at p. 30.

(*p*) *Kirchner* v. *Venus* (1859), 12 Moore, P. C. 361, at p. 398.

(*q*) *Morrison* v. *Parsons* (1810), 2 Taunt. 407, at p. 415.

(*r*) *Benson* v. *Chapman* (1849), 2 H. L. C. 696.

(*s*) *Place* v. *Potts* (1855), 5 H. L. C. 383.

express contract in such bills of lading will be made with the person for whom the master is understood by the shipper to sign as agent; *e.g.*, with the shipowner, if the shipper is ignorant of the charter; with the charterer, if the shipper knows of the charter, unless the charter itself negatives the latter presumption (*t*).

The fact that the master has power to sign bills of lading "without prejudice to the charter," will not render the shipper liable under the charter, but will only protect the shipowner from any alteration of his contract with and remedies against the charterer (*u*), and *vice versâ* (*v*).

Where the shipowner has under the charter a lien for freight, and his master waives this lien on demand by the shipper or consignee for the goods, a contract by the shipper or consignee with the shipowner to pay him the freight for which the lien is claimed may be found as a fact (*x*) from such demand and delivery, although the shipper or consignee is aware of the charter (*y*).

Note.—Lush, J., in *Smidt* v. *Tiden* (*z*) suggests that the master signs bills of lading under a charter, not as charterer's agent, but because he is bound by the charter to sign. *Quære*, if the master intends to sign as agent for the charterer, having power to sign bills of lading "without prejudice to the charter," but the shipper, being ignorant of the charter, thinks he is signing as agent of the shipowner, whether there is any contract at all, excepting such as may be found as a fact from subsequent demand of the goods under the bill of lading and delivery?

Case 1.—A. chartered a ship to C. to carry corn at 4*s.* 6*d.* per quarter. C. could not provide a cargo, and the master, (whether as agent of A. or

(*t*) *Vide* Article 18, *Marquand* v. *Banner* (1856), 6 E. & B. 232; *Zwilchenbart* v. *Henderson* (1854), 9 Ex. 722, 23 L. J. Ex. 234; *Michenson* v. *Begbie* (1829), 6 Bing. 190. Where the intention is that the charterer shall employ the ship as a general ship for his own profit, when the master signs bills of lading, he does so as the agent of the charterer, not of the owner. But still, the owner, being in possession of the ship by his master and crew, has rights in respect of this possession, as to claim a lien on goods on board for freight due to him under the charter. *Schuster* v. *McKellar* (1857), 7 E. & B. 704, 724, see also *Wagstaff* v. *Anderson* (1880), L. R. 5 C. P. D. 171, per Bramwell, L.J.

(*u*) *Shand* v. *Sanderson* (1859), 4 H. & N. 381.

(*v*) *Rodoconachi* v. *Milburn* (1886), L. R. 17 Q. B. D. 316.

(*x*) It will not be implied as a matter of law: see *Sanders* v. *Vanzeller* (1843), 4 Q. B. 260.

(*y*) *Swan* v. *Barber* (1879), L. R. 5 Ex. D. 130.

(*z*) (1874), L. R. 9 Q. B. 447.

C. was not clear), agreed with F. to carry corn for him at 6*s.* per quarter: C. entered into a sub-charter with F. at that rate. On arrival, A. delivered corn to F., but F. refused to pay A. more than 4*s.* 6*d.*, C. having given him notice to pay the remaining 1*s.* 6*d.* to him. *Held*, that C. was entitled to the 1*s.* 6*d.*, and that no contract by F. to pay more than 4*s.* 6*d.* could be implied from his taking delivery (*a*).

Case 2.—E. master of a ship chartered her to C., "captain to sign bills of lading at more or less freight without prejudice to this agreement, proceed to Z., and there deliver on being paid freight a lump sum of £100." C. put on board 1350 bags of flour; and F. loaded 500 bags of flour, for which E. signed a bill of lading, "which goods I shall deliver to G. for you, paying me freight according to contract with C." F. wrote to G. and to C., stating that G. would pay a certain freight to C. On arrival at Z., C. paid £100 to E. G. received the cargo from E. under the bill of lading, but refused to pay freight to C. *Held*, that E. could not sue G. on any contract to pay freight either express or implied (*b*).

Case 3.—A. chartered a ship to C. to carry cargo on being paid freight at 75*s.* per ton, captain to sign bills of lading, without prejudice to charter, at any rate of freight required. D., C.'s agent, purchased goods for C., taking the bills of lading, which provided for freight at 20*s.* per ton, in his own name. In transit, C. failed. On arrival, A. claimed against D. chartered freight. *Held*, he was only entitled to bill of lading freight (*c*).

Case 4.—E. A., master and part owner of a ship, chartered it to C. for a certain voyage for a lump sum of £850, "payment to be by E. A.'s receiving such freight as C. may have payable abroad as per bills of lading, not exceeding half, balance by bills from C. Master, at C.'s request, to sign bills of lading in the usual and customary manner, and at any rate of freight that may be filled up, and made payable in any manner the charterers may choose without prejudice to this charter." C. put the ship up as a general ship, and E. A. signed bills of lading, "freight paid here as per margin;" £250 was payable abroad, which E. A. received, and took C.'s acceptance for £600, making up £850. C. failed before the bills became due, and E. A. and C.'s representative each claimed the balance of the freight against the shippers. *Held*, that E. A. was acting as C.'s agent in signing bills of lading, and that C. and not E. A. was therefore entitled to the balance of the freight (*d*).

(*a*) *Michenson* v. *Begbie* (1829), 6 Bing. 190.
(*b*) *Zwilchenbart* v. *Henderson* (1854), 23 L. J. Ex. 234.
(*c*) *Shand* v. *Sanderson* (1859), 4 H. & N. 381.
(*d*) *Marquand* v. *Banner* (1856), 6 E. & B. 232; see also *Smidt* v. *Tiden*, L. R. 9 Q. B. 446 (1874). *Marquand* v. *Banner* has been criticised by Cresswell and Willes, JJ., in *Gilkison* v. *Middleton* (1857), 2 C. B., N. S. 134. There A. the shipowner claimed against holders of the bills of lading a lien for freight due under the charter, though the master had signed bills of lading at a lower rate under a clause in the charter, requiring him to sign bills of lading as freights required by C. the charterer, without prejudice to the charter. It was held that A. had only a lien for the lower freight, on the ground that the master was his agent to sign bills of lading at a lower freight. This does not shew that A. could have sued the shippers for freight, but only that against third parties ignorant of the charter, the master by signing bills of lading with the authority of the owner waived his lien against persons holding such bills, for sums of which there was no notice in the bills. *Marquand* v. *Banner* seems therefore good law.

VI. Assignee of Ship or Freight.

The assignee of a ship or of its freight (*e*) is entitled to all freight due after the assignment, which the assignor had at the time of assignment the right to transfer from the moment at which he has gone through the forms necessary to complete his title (*f*).

The assignee of a share in the ship is entitled to his share in the freight under similar circumstances (*g*).

Case.—A., in June 1884, sold by bills of sale, $\frac{24}{64}$ of his ship to B., $\frac{40}{64}$ to Q. B. registered his bill of sale in November. In December, A. assigned the freight to be earned on a voyage then in progress to E., and E. gave notice thereof to C., the charterer. In January, 1885, Q. registered his bill of sale. *Held*, B. was entitled to $\frac{24}{64}$; E. to $\frac{40}{64}$ of the freight (*g*).

Note.—If the assignment is in writing and absolute, and not by way of charge (*h*), the assignee, after giving notice to the persons liable to pay freight, can sue in his own name (*i*). Where these conditions are not complied with, he can still only sue in the name of the assignor, as before the Judicature Acts (*k*). An assignment, absolute in form, may be looked into to see whether it is in substance by way of charge (*l*). Notice of the assignment of freight to the person liable to pay it takes it out of the order and disposition of the assignor (*m*).

VII. Mortgagee of Ship and Freight.

A mortgagee who has not entered into possession of the mortgaged ship, has no absolute right to the freight the ship may be earning, and cannot compel its payment to

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(*e*) An assignment of freight to be earned is good, *Leslie* v. *Guthrie* (1835), 1 Bing. N. C. 697; *Lindsay* v. *Gibbs* (1856), 22 Beav. 522, overruling *Robinson* v. *Macdonnell* (1816), 5 M. & S. 228.

(*f*) See *Lindsay* v. *Gibbs*, *vide supra*; *Morrison* v. *Parsons* (1810), 2 Taunt. 407; *Gardner* v. *Cazenove* (1856), 1 H. & N. 423; *Boyd* v. *Mangles* (1849), 3 Ex. 387.

(*g*) *Lindsay* v. *Gibbs*, *vide supra*.

(*h*) See *National Provincial Bank* v. *Harle* (1881), L. R. 6 Q. B. D. 626; *Burlinson* v. *Hall* (1884), 12 Q. B. D. 347.

(*i*) Jud. Act, 1873, s. 25, sub-s. 6.

(*k*) See *De Pothonier* v. *De Mattos* (1858), E. B. & E. 461; *Wilson* v. *Gabriel* (1863), 4 B. & S. 243; and *Weguelin* v. *Cellier* (1873), L. R. 6 H. L. 286, as to set off.

(*l*) *Gardner* v. *Cazenove* (1856), 1 H. & N. 423.

(*m*) *Douglas* v. *Russell* (1831), 4 Sim. 524.

himself by simply giving notice to the person liable to pay it (*p*).

On taking actual or constructive possession (*q*) he then becomes entitled to all the freight that the ship is in course of earning, whether under an express contract (*r*), or, if none exists, under a *quantum meruit* (*s*), or to the freight already earned if it has not yet been paid (*t*).

Case 1.—E., master of A.'s ship, carried a cargo of wheat "on owner's account," purchased on the credit of P., to whom E. gave bills of lading, for "wheat shipped on owner's account, deliverable to P.'s order at freight of 1*s.* per ton," and bills of exchange for the price, which A. accepted. A. had mortgaged his ship to M. A. sold the cargo *in transitu* to K., the sale note running, "As cargo is coming on ship's account, freight is to be computed at 55*s.* per ton." A. indorsed the bills of lading, which he had received from P. on the acceptance of the bills of exchange, to K. with a memo.: "The freight assigned is at the rate of 55*s.* per ton, and not the nominal amount of 1*s.* per ton." On the ship's arrival, M., as mortgagee, took possession, and claimed freight at 55*s.* from K., who refused to pay more than 1*s.* *Held*, that M. was only entitled to the freight named in the bill of lading, the larger sum being in reality part of the purchase money, and no claim of *quantum meruit* being possible in face of the express contract (*t*).

Case 2.—A. mortgaged his ship charters and freight to M., and subsequently chartered her, and mortgaged the freight to N., "the freight to be paid on unloading and right delivery of the cargo." The ship arrived in port, and most of the cargo had been delivered to the consignees, when M. took possession. *Held*, that as no freight was payable under the charter, till the whole cargo was delivered, M. was entitled by taking possession to the whole freight under the charter (*x*).

Case 3.—A. mortgaged his ship to M., and afterwards chartered her to C., the charter providing that C. should make advances not exceeding £150 on account of freight, the balance £450 to be paid on delivery of the cargo. C. advanced abroad £300. On the ship's arrival, M. took possession, and

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(*p*) *Keith* v. *Burrows* (1877), L. R. 2 App. C. 636; *Liverpool Marine Co.* v. *Wilson* (1872), L. R. 7 Ch., at p. 511; *Gardner* v. *Cazenove* (1856), 1 H. & N. 423; *Dean* v. *M'Ghie* (1826), 4 Bing. 45; *Kerswill* v. *Bishop* (1832), 2 C. & J. 529; *Willis* v. *Palmer* (1859), 7 C. B., N. S. 340.

(*q*) As by giving notice to the mortgagor and charterer, the ship being at sea, and actual possession impossible; *Rusden* v. *Pope* (1868), L. R. 3 Ex. 269: or, where the mortgagor is ship's husband, by his removal by the other part owners and the mortgagee; *Beynon* v. *Godden* (1878), L. R. 3 Ex. D. 263.

(*r*) But no more, even though the freight in the contract is nominal: *Keith* v. *Burrows*, *vide supra*.

(*s*) *Gumm* v. *Tyrie* (1865), 4 B. & S. 680; 6 B. & S. 299.

(*t*) *Keith* v. *Burrows*; *Liverpool Co.* v. *Wilson*; *Rusden* v. *Pope*, *vide supra*; *Brown* v. *Tanner* (1868), L. R. 3 Ch. 597; *Wilson* v. *Wilson* (1872), L. R. 14 Eq. 32. As to priority of mortgagees: see *Liverpool Co.* v. *Wilson*; *Brown* v. *Tanner*, *vide supra*.

(*x*) *Brown* v. *Tanner* (1868), L. R. 3 Ch. 597.

claimed £450 balance of freight from C. C. claimed to deduct £150 for advances. *Held*, that the advance of £150 beyond the £150 warranted by the charter was simply a loan, and not a prepayment of freight, and that therefore C. was not entitled to deduct it from the freight due (*y*).

Article 148.—*Freight, by whom payable.*

Freight is *primâ facie* payable according to the terms of the contract of affreightment, and by the person with whom such contract is made. But a new contract may be presumed as a fact from demand of the goods, and their delivery by the master without insisting on his lien (*z*).

Freight may be payable by—

I. The shipper.

II. The consignee.

III. The holder of the bill of lading.

I. The Shipper.

From shipment of goods upon a vessel for a certain voyage, a contract by the shipper to pay freight for such goods is implied (*a*).

From this implied contract the shipper may be freed, either by express contract in the bill of lading, or by delivery by the master on a bill of lading with an indorsement freeing the shipper, whose terms are known to the master when he delivers the goods (*b*). The shipper does not free himself from such liability by indorsing the bill of lading so as to pass the property, even to the shipowner (*c*). Nor will the

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(*y*) *Tanner* v. *Phillips* (1872), 42 L. J. Ch. 125. In *The Salacia* (1862), 32 L. J. Adm. 43, the charter authorised "necessary ordinary expenses": see Article 137.

(*z*) *Cock* v. *Taylor* (1811), 13 East, 399; *Sanders* v. *Vanzeller* (1843), 4 Q. B. 260, in which the earlier authorities are discussed. Many of these, *e.g.*, *Drew* v. *Bird* (1828), M. & M. 156; *Artaza* v. *Smallpiece* (1793), 1 Esp. 23 (on which see *Cock* v. *Taylor*, *vide supra*), and *Moorsom* v. *Kymer* (1814), 2 M. & S. 303, must be taken as overruled.

(*a*) *Domett* v. *Beckford* (1833), 5 B. & Ad. 521; *G. W. R.* v. *Bagge* (1885), 15 Q. B. D. 626; *Shepard* v. *De Bernales* (1811), 13 East, 565; *Christy* v. *Row* (1808), 1 Taunt. 300.

(*b*) *Lewis* v. *McKee* (1868), L. R. 4 Ex. 58, a case of consignee: see for the general principles, *Watkins* v. *Rymill* (1883), 10 Q. B. D. 178.

(*c*) *Fox* v. *Nott* (1861), 6 H. & N. 630.

presence of the clause in the bill of lading, "to be delivered to consignee or assigns, he or they paying freight for the same," free the shipper, if the master deliver under such a bill to the consignee without insisting on his lien for freight (*d*), unless the master was offered cash by the consignees, and for his own convenience took a bill of exchange, which was afterwards dishonoured, in which case the shipper will be freed (*e*).

Case.—A. chartered a ship to D. to carry iron at 7*s.* 3*d.* per ton: the next day, D., professing to act as A.'s broker, chartered it to C., to carry iron at 8*s.* per ton; each charter contained clauses making freight payable on signing bills of lading, and giving the owner an absolute lien for freight. Neither A. nor C. knew of the other charter, and D. had no authority to make it as broker for A. C. shipped his iron under bills of lading signed by the master making the goods deliverable to "consignees he or they paying freight as per charter." The master did not demand freight on signing bills of lading, and he delivered to the consignees without insisting on his lien. C. paid 8*s.* per ton to D. who became bankrupt. A. sued C. for freight at 7*s.* 3*d.* *Held*, there was neither an express, nor an implied contract on which A could sue C., the parties never having been *ad idem* (*f*).

II. The Consignee.

The consignee named in the bill of lading to whom by the consignment the property in the goods shall pass, is by statute liable to pay freight, on the terms of, and as if, the contract contained in the bill of lading had been made with himself (*g*). If he is the owner of the goods, he is also *primâ facie* liable to pay freight for them, as being the person with whom the contract of carriage is presumed to be made (*h*).

If the consignee demands goods under a bill of lading, making them deliverable on payment of freight, though no contract is implied in law from such delivery, it will be

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(*d*) *Shepard* v. *Benales*, *vide supra*. Such clauses are inserted for the benefit of the master, confirming his lien, and not of the shipper.

(*e*) *Marsh* v. *Pedder* (1815), 4 Camp. 257; *Tapley* v. *Martens* (1800), 8 T. R. 451; *Strong* v. *Hart* (1827), 6 B. & C. 160.

(*f*) *Smidt* v. *Tiden* (1874), L. R. 9 Q. B. 446.

(*g*) Bills of Lading Act (1855), 18 & 19 Vict. c. 111, s. 1. Appendix III.

(*h*) *Coleman* v. *Lambert* (1839), 5 M. & W. 502; *Dickenson* v. *Lano* (1860), 2 F. & F. 188. All cases before 1855 freeing the consignee from liability to pay freight must be read in the light of the Bills of Lading Act.

evidence from which a jury may find a new contract to pay freight (*i*), unless the bill of lading clearly negatives such a contract (*k*). A new contract may also be proved by evidence of previous dealings between the parties (*l*), or of an usage of trade (*m*).

Entry of the goods at the custom house is *primâ facie* evidence that the person in whose name they are entered is their owner and liable to pay freight for them, but he can rebut this presumption by showing that his entry was merely as agent (*n*).

III. An Indorsee of the Bill of Lading, or Person taking delivery under it.

Indorsees of the bill to whom by the indorsement the property in the goods has passed (*o*), and who have not freed themselves from liability by such an indorsement as passes the property (*p*); and indorsees to whom the property in the goods has not passed by the indorsement, but who complete their proprietary rights by taking delivery of the goods under their indorsed bill of lading (*o*), are by statute liable to pay freight for the goods according to the bill of lading (*q*).

(*i*) *Cock* v. *Taylor* (1811), 13 East, 399; *Dougal* v. *Kemble* (1826), 3 Bing. at p. 389; *Amos* v. *Temperley* (1841), 8 M. & W. 798, at p. 805; *Sanders* v. *Vanzeller* (1843), 4 Q. B. 260; *Kemp* v. *Clark* (1848), 12 Q. B. 647.

(*k*) *Amos* v. *Temperley*, *vide supra*, in which the bill of lading expressly stated that the defendant was consignee as agent for another: *Howard* v. *Tucker* (1831), 1 B. & Ad. 712, where the bill of lading contained a statement that the freight had been paid in advance, which, though incorrect, was held inconsistent with a new contract to pay it. See also *Ward* v. *Felton* (1801), 1 East, 507; *Kennedy* v. *Gonveia* (1823), 3 D. & R. 503.

(*l*) *Wilson* v. *Kymer* (1813), 1 M. & S. 157; where it was proved that when similar goods had been previously delivered to defendant, he had always paid the freight.

(*m*) As in *Dickenson* v. *Lano*, *vide supra*, where evidence of a custom of the stone trade that the consignee always, the quarry-owner never, paid the freight, was held admissible.

(*n*) *Ward* v. *Felton* (1801), 1 East, 507; *Wilson* v. *Kymer* (1813), 1 M. & S. 157; *Artaza* v. *Smallpiece* (1793), 1 Esp. 23.

(*o*) *Sewell* v. *Burdick* (1884), L. R. 10 App. C. 74, *et* Article 75.

(*p*) *Smurthwaite* v. *Wilkins* (1862), 11 C. B., N. S. 842.

(*q*) 18 & 19 Vict. c. 111, Appendix III. For cases before this Act, see *Crawford* v. *Tobin* (1842), 9 M. & W. 716; *Dougal* v. *Kemble* (1826), 3 Bing. 383; *Bell* v. *Kymer* (1814), 1 Marsh. 146.

Other indorsees of the bill of lading who take delivery under it, but who do not acquire proprietary rights by so doing (*r*), are only liable if a new contract to pay freight can be found as a fact from the circumstances attending delivery (*s*), and the terms of the bill of lading (*t*).

(*r*) *Sewell* v. *Burdick*, note (*o*), *ante*, p. 246.
(*s*) *Sanders* v. *Vanzeller* (1843), 4 Q. B. 260; *Young* v. *Moeller* (1855), 5 E. & B. 755; *Kemp* v. *Clark* (1848), 12 Q. B. 647.
(*t*) See *Howard* v. *Tucker* (1831), 1 B. & Ad. 712; *Lewis* v. *McKee* (1868), L. R. 4 Ex. 58; *Amos* v. *Temperley* (1841), 8 M. & W. 798.

SECTION XI.

LIEN.

Article 149.—*Kinds of Lien.*

A SHIPOWNER may have a lien on goods carried for charges incurred in carrying them:—

I. By Common Law.
II. By express agreement.

By Common Law he has a lien for,—

1. Freight (*a*);
2. General average contributions (*b*);

both of which are possessory liens depending on the possession of the goods.

3. Expenses incurred by the shipowner or master in protecting and preserving the goods, which give rise to a maritime lien, independent of possession (*c*).

Article 150.—*Common Law Lien for Freight.*

The Common Law lien for freight, which is a possessory lien, only exists where the agreed time for payment of freight is contemporaneous with the time of delivery of the goods (*d*).

(*a*) See Articles 150–154.
(*b*) See Articles 117–120.
(*c*) See Articles 101, 121, and *Hingston* v. *Wendt* (1876), L. R. 1 Q. B. D. 367, at p. 372.
(*d*) See *per* Brett, J., in *Allison* v. *Bristol Marine Insurance Co.* (1876), L. R. 1 App. C., at p. 225, explaining *Kirchner* v. *Venus* (1859), 12 Moore, P. C. 361, at p. 390.

In the absence of express agreement there is, therefore, no lien for,—

(1.) Advance freight, or freight payable before the delivery of the goods (*e*).

(2.) Freight agreed to be paid after the delivery of the goods, or not due when the goods are claimed (*f*).

Case 1.—Goods were shipped to be carried to Z. under bills of lading, "freight for the said goods to be paid at L., ship lost or not lost." The ship was lost, but the goods were saved. The shipowners claimed a lien. *Held*, that there was no such lien without express agreement (*g*).

Case 2.—Goods shipped under a bill of lading, "deliverable to order or assigns on payment of freight, as per charter . . . . the freight to be paid on unloading and right delivery of the cargo less advances in cash (*h*), at current rates of exchange . . . . half freight to be advanced by freighters' acceptance at three months on signing bills of lading, ... owner to insure the amount and deposit with freighter the club policy." The freighter gave his bill at three months for half freight, and the master endorsed on the bill of lading, "received on account of the within freight £300 as per charter." On arrival, before freighter's acceptance became due, the captain heard that the freighter was bankrupt, and refused to deliver the cargo, except the whole freight was paid. *Held*, that there was no lien on the cargo for the £300 advance freight (*i*).

Case 3.—A charter provided for payment of freight at 33*s.* 3*d.* per ton, the shipowner to have an absolute lien on the cargo for freight; the captain to sign bills of lading at any rate of freight, but should the total freight as per bills of lading be under the amount estimated to be earned by the charter, the captain to demand payment of the difference in advance. The captain signed bills of lading under the chartered rate, but did not demand payment of the difference. *Held*, there was no lien for such difference (*k*).

Case 4.—C., chartered a ship from A., to proceed to L. at 77*s.* 6*d.* per ton freight and hire, £250 to be advanced in cash on signing bills of lading,

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(*e*) *How* v. *Kirchner* (1857), 11 Moore, P. C. 21; *Kirchner* v. *Venus*, *vide supra*. *Ex parte Nyholm, In re Child* (1873), 29 L. T. 634; *Nelson* v. *Association for Protection of Wrecked Property* (1874), 43 L. J. C. P. 218; *Tamvaco* v. *Simpson* (1866), L. R. 1 C. P. 363; *Gardner* v. *Trechmann* (1884), 15 Q. B. D. 154. The case of *Gilkison* v. *Middleton* (1857), 2 C. B., N. S. 134, adversely criticised in *Kirchner* v. *Venus*, is distinguishable on the ground that a lien for all freight due under the charter was expressly given by the charter; though as this was not incorporated in the bill of lading, to make consignees for value liable for it seems contrary to such cases as *Fry* v. *Mercantile Bank* (1866), L. R. 1 C. P. 689. In *Neish* v. *Graham* (1857), 8 E. & B. 505, there was no such express lien, and it must be taken as overruled.

(*f*) *Foster* v. *Colby* (1858), 3 H. & N. 705; *Thompson* v. *Small* (1845), 1 C. B. 328; *Alsager* v. *St. Katharine's Docks* (1845), 14 M. & W. 794; *Lucas* v. *Nockells* (1828), 4 Bing. 729; the agreement to receive payment subsequently is treated as a waiver of the lien.

(*g*) *Nelson* v. *Association for Protection of Wrecked Property* (1874), 43 L. J. C. P. 218.

(*h*) *Held* = to be paid in cash, less advances.

(*i*) *Tamvaco* v. *Simpson* (1866), L. R. 1 C. P. 363.

(*k*) *Gardner* v. *Trechmann* (1884), 15 Q. B. D. 154.

and clearing at the custom house, and remainder on delivery at L. Ship to have an absolute lien for freight, dead freight, and demurrage. After the ship was loaded, and before she sailed, C. failed, and his trustee disclaimed the charter. A. claimed a lien on the cargo for at least the £250. *Held*, that being advance freight, there was no lien for it by common law or custom, and that the clause in the charter was not enough to give a lien for it, as it was not "freight" (*l*).

Case 5.—C. chartered a ship from A., freight to be paid £1250 at port of loading and £1000 on delivery, the remainder in cash two months from vessel's report inwards, and after right delivery of the cargo. A. to have an absolute lien on the cargo for all freight. *Held*, that A. had no lien under the charter for the freight payable "after delivery of goods." (*m*).

Article 151.—*On what Goods.*

The Common Law lien for freight applies to all goods coming to the same consignee on the same voyage, for the freight due on all or any part of them (*n*), but not to goods on different voyages under different contracts (*o*).

Article 152.—*For what Amount* (*p*).

When, the ship being chartered, the consignee is the charterer or his agent, he will be bound by the lien for freight due under the charter (*q*), unless a new contract exonerating him has been made in the bill of lading (*r*).

Where the consignee is an indorsee for value of the bill of lading from the charterer, or represents a shipper, other than the charterer, whether aware of the charter or not, he will only be bound by the lien for freight contained in the charter, as distinguished from the freight specified in the bill of lading, if a clear intention to that effect is shown in

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(*l*) *Ex parte Nyholm, In re Child* (1873), 29 L. T. 634.

(*m*) *Foster* v. *Colby* (1858), 3 H. & N. 705.

(*n*) *Sodergren* v. *Flight* (1796), cited, 6 East, 622; *Perez* v. *Alsop* (1862), 3 F. & F. 188.

(*o*) *Bernal* v. *Pim* (1835), 1 Gale, 17.

(*p*) See Article 144. Amount of freight.

(*q*) *McLean* v. *Fleming* (1871), L. R. 2 H. L. (Sc.) at pp. 133, 134; *Kern* v. *Deslandes* (1861), 10 C. B., N. S. 205; *Campion* v. *Colvin* (1836), 3 Bing. N. S. 17; *Small* v. *Moates* (1833), 9 Bing. 574; *Gledstanes* v. *Allen* (1852), 12 C. B. 202. These cases in view of later law, *e.g. Fry* v. *Mercantile Bank* (1866), L. R. 1 C. P. 689, must be limited strictly to the charterer and persons identical with him in interest, and many *dicta* in them are now no longer law.

(*r*) As in *Gullischen* v. *Stewart* (1884), 13 Q. B. D. 317; and as suggested by Willes, J., in *Pearson* v. *Goschen* (1864), 17 C. B., N. S. at p. 374.

the bill of lading (*s*). If a shipper ships goods in ignorance of the charter, he can decline to accept bills of lading for them in accordance with the charter but in an unusual form, and can demand his goods back free of expense, the liens in the charter or otherwise not attaching to them (*t*).

Case 1.—C. chartered a ship from A. "The ship to have a lien on cargo for freight, 70*s.* per ton . . . . to be paid on unloading of the cargo." C. shipped goods under a bill of lading, "Freight for the goods payable in L. as per charter," and indorsed the bill to F. for value. *Held*, that against F., the shipowners had a lien only for the freight due for the goods included in the bill of lading, and not a lien for the whole chartered freight (*u*).

Case 2.—C. chartered a ship from A., and put it up as a general ship: F. shipped goods in ignorance of the charter. The captain refused to sign bills of lading, except in terms of the charter, which gave liens for demurrage, dead freight, &c., and refused to deliver up the goods. *Held*, that A. was bound to redeliver the goods to F. free of any claim for lien or charges (*v*).

Article 153.—*Lien: how waived.*

The shipowner's lien for freight may be waived: as by acceptance of a bill for the freight (*x*); by making the freight payable after the delivery of the goods (*y*); or by delivery without requiring payment, unless such delivery was induced by fraud (*z*)

Article 154.—*Lien: how maintained.*

The shipowner may do what is reasonable to maintain his lien: *e.g.*, he may bring the goods back from their destination, if the lien is not discharged there (*a*). He will not lose

(*s*) *Pearson* v. *Goschen* (1864), 17 C. B., N. S. 352; *Foster* v. *Colby* (1858), 3 H. & N. 705; *Fry* v. *Mercantile Bank* (1866), L. R. 1 C. P. 689; *Gardner* v. *Trechmann* (1884), 15 Q. B. D. 154; *The Norway* (1864), B. & L. 226. See also *ante*, Articles 18, 19. So far as *Gilkison* v. *Middleton* (1857), 2 C. B., N. S. 134, is contrary to this, it must be taken as overruled. See Article 150, note (*e*).

(*t*) *Peek* v. *Larsen* (1871), L. R. 12 Eq. 378; *The Stornoway* (1882), 51 L. J. Ad. 27, *et ante*, Article 18.

(*u*) *Fry* v. *Mercantile Bank*, *vide supra*.

(*v*) *Peek* v. *Larsen* (1871), L. R. 12 Eq. 378, and see *ante*, Article 18.

(*x*) *Tamvaco* v. *Simpson* (1866), L. R. 1 C. P. 363; *Horncastle* v. *Farran* (1820), 3 B. & A. 497.

(*y*) *Foster* v. *Colby* (1858), 3 H. & N. 705.

(*z*) *Semble*, that as such a delivery would not prevent stoppage *in transitu*, neither would it waive lien: *vide* Article 68, *ante*.

(*a*) *Edwards* v. *Southgate* (1862), 10 W. R. 528; *Cargo ex Argos* (1873), L. R. 5 P. C. 134.

his lien by consenting to hold as agent for the consignee (*b*), nor by warehousing the goods ashore, in his own, a statutory, or (*semble*) a hired warehouse (*c*).

Submitted.—In the absence of express agreement or statutory powers, the owner or captain has no power to sell goods on which he has a lien, to realise the freight due on them, unless the goods, having been abandoned by all persons entitled to them, have become his property.

Note.—In England, the proceedings for maintaining and enforcing liens by means of warehousing with a stop for freight and sale are contained in 25 & 26 Vict. c. 63, §§ 68–78. See Appendix III.

Lien for General Average: see Article 117.
Lien for expenditure on cargo: *see Article* 101.

Article 155.—*Liens not supported by Common Law.*

There is no lien by Common Law :—

(1.) For dead freight (*d*).

(2.) To the holders of a bill of exchange drawn against a particular cargo, on such cargo, in the absence of express intention to give such a lien (*e*).

(3.) To the shipowner, for wharfage dues on overside goods (*f*).

(4.) For port charges, though the charterer has agreed to pay them (*g*).

(5.) For demurrage, or damages by detention (*h*).

(6.) Nor on goods shipped on ship's account (*i*).

(*b*) *Allan* v. *Gripper* (1832), 2 C. & J. 218; *Kemp* v. *Falk* (1882), L. R. 7 App. C. at p. 584.

(*c*) *The Energie* (1875), L. R. 6 P. C. 306; *Mors le Blanch* v. *Wilson* (1873), L. R. 8 C. P. 227.

(*d*) See Article 161.

(*e*) *Robey* v. *Ollier* (1872), L. R. 7 Ch. 695; *Phelps* v. *Comber* (1885), L. R. 29 Ch. D. 813; *Ex parte Dever, In re Suse* (1884), L. R. 13 Q. B. D. 766: *Frith* v. *Forbes* (1862), 4 De G. F. & J. 409, the one case in which an express intention to give such a lien has been found, has been so doubted, see especially *Phelps* v. *Comber*, as to be a very unsafe authority to follow.

(*f*) See Article 127 and notes; Appendix II.; *Bishop* v. *Ware* (1813), 3 Camp. 360. If, however, the goods have been justifiably landed under Article 127, the wharfowner will have a lien for such wharfage dues.

(*g*) *Faith* v. *East India Co.* (1821), 4 B. & A. 630.

(*h*) *Birley* v. *Gladstone* (1814), 3 M. & S. 205, and see Article 54.

(*i*) *Swan* v. *Barber* (1879), L. R. 5 Ex. D. 130.

Article 156.—*Lien of Broker.*

A shipping agent or broker has a lien on the bill of lading, and so indirectly on the goods, for his charges (*k*).

Article 157.—*Lien by express Agreement.*

Where a lien for certain charges is expressly stipulated for, the fact that such a lien is inconvenient will be no answer to the express terms of the agreement (*l*).

Thus there may be liens by contract for,—

(1.) Dead freight (*m*).

(2.) Demurrage or damages for detention (*n*).

(3.) Advance freight (*o*).

(4.) Charterparty freight, as against the holder of the bill of lading (*p*).

(5.) "All moneys becoming in any way due to the shipowners under the provisions of the bill of lading."

(6.) "All fines, and expenses, or losses by detention of or damage to vessel or cargo, caused by incorrect description of goods, or shipment of dangerous goods without notice."

(7.) "All previously unsatisfied freight and charges on other goods due in respect of any shipment by any steamer or steamers of this line from either shipper or consignee, such lien to be made available at shipowner's option by sale or otherwise" (*q*).

(*k*) *Edwards* v. *Southgate* (1862), 10 W. R. 528.

(*l*) *McLean* v. *Fleming* (1871), L. R. 2 H. L., Sc. at p. 135. The fact that a clause giving the lien is in the bill of lading, is not conclusive that it is part of the contract between the parties: see *Crooks* v. *Allan* (1879), 5 Q. B. D. 38, and pp. 6, 7, *ante*.

(*m*) See Article 161.

(*n*) See Article 54.

(*o*) See Article 137.

(*p*) See Articles 19, 144, 152.

(*q*) This clause would seem to require a good deal of large print to call shipper's attention to it.

SECTION XII.

DAMAGES.

Article 158.—*Rule of Damages.*

WHERE two parties have made a contract, which one of them has broken, the damages which the other ought to receive should be such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

Thus where special circumstances exist, by reason of which a breach of the contract would cause greater loss than would naturally occur from the breach of a contract of that kind:—

(1.) If those special circumstances were known to both parties at the time of making the contract, and such knowledge formed the basis of the contract, the person breaking the contract will be liable for the damages naturally resulting from a breach under such special circumstances.

(2.) If such special circumstances were either unknown to the party breaking the contract, or being known did not form the basis of the contract, he would only be liable for the damages naturally and usually resulting from a breach of the contract, as he understood it (*a*).

Article 159.—*Damages for failure to carry safely.*

Where goods are lost or delayed in carriage by sea, the damages will, in the absence of special circumstances in the contract, be the ordinary damages resulting from the loss or

(*a*) *Hadley* v. *Baxendale* (1854), 9 Ex. 341, at p. 354; Mayne on Damages.

delay of such goods, and will not include damage by loss of market (*b*), or by a fall in the price of such goods (*c*), or by stoppage of business through their non-delivery (*d*), or by loss of profit under a sub-contract unknown to the shipowner (*e*).

But where it is part of the common knowledge of the contracting parties, that the goods are wanted for a particular market, or for a particular season, at which they will command a special price, or to fulfil a special sub-contract, damages for the loss of such market, season, or sub-contract, may be recovered (*f*).

Case 1.—F. shipped on A.'s ship several cases containing machinery for a sawmill at Z., and described as "merchandise." A. knew the general nature of the shipment. On arriving at Z. one of the cases was missing, and the sawmill could not be erected till it had been replaced. *Held*, that F. was entitled to the cost of replacing the missing machinery at Z., and to 5 per cent. interest on such cost, for the delay, but not to damages for the estimated profits of the mill during the delay (*d*).

Case 2.—F. shipped goods on A.'s ship, and afterwards, unknown to A., effected a sub-contract for resale of them. The goods were damaged by bad stowage, and in consequence F. was unable to fulfil the sub-contract. *Held*, that F. could not recover the profits lost under the sub-contract as damages from A. (*g*).

Case 3.—F. shipped hemp on A.'s ship; owing to defective engines, the ship took 127 days on the voyage, 65 days being an average voyage. During the delay the price of hemp fell; and the consignee claimed his loss as damages from A. *Held*, he could not recover it (*h*).

Case 4.—F. ships cattle from the States for the Christmas Smithfield market, such shipment and the usual fall of the price of dead meat after Christmas being well known in the cattle trade. Owing to the ship's un-

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(*b*) Many bills of lading expressly provide that the ship shall not be liable for claims for delay, loss of market, or sea risks, if the goods are carried past their destination. The Eastern trade, however, has usually the clause: "That such goods are when found to be sent back at ship's risk and expense, and subject to any proved claim for loss of market." The stipulation that the shipowner shall not be liable for more than the invoice cost of the goods is very usual. There is sometimes a clause, "price, in case of short delivery, to be the market price of the day at port of discharge, on the day of steamer's reporting, less charges and brokerage." There are usually clauses limiting the time within which claims will be recognised. See *ante*, pp. 152, 208.

(*c*) *The Parana* (1877), L. R. 2 P. D. 118. See also for case of tort, *The Notting Hill* (1884), 9 P. D. 105.

(*d*) *British Columbia Co.* v. *Nettleship* (1868), L. R. 3 C. P. 499.

(*e*) *The St. Cloud* (1863), B & L. 4; but where the shippers have sold the goods "to arrive" at a certain price, they will not be allowed to recover more, though the market price on the day when the ship should have arrived was higher: *Rodoconachi* v. *Milburn* (1886), 17 Q. B. D. 316.

(*f*) *The Parana*, *vide supra*, at p. 121.

(*g*) *The St. Cloud* (1863), B. & L. 4.

(*h*) *The Parana* (1877), L. R. 2 P. D. 118.

seaworthiness, the cattle miss the Christmas market. *Submitted*, that the shipper can recover the loss by the fall of price, from A. (*i*).

Case 5.—A.'s ship was chartered by C. to load coal at X. and proceed to Z. A. broke his contract. C. chartered another vessel, at a higher freight, and purchased coal at a higher price, the first cargo being lost through the delay. *Held*, C. could recover from A. as damages: (1) the excess freight paid. (2) *primâ facie*, the excess price of coal, but that A. might meet this by showing a corresponding rise in the value of coal at Z. (*k*).

Case 6.—C. had sold a cargo "to arrive" at £3 a ton. The ship was lost. The market price of the cargo on the day the ship would have arrived was £3 5*s.* a ton. *Held*, that C. could only recover from the shipowner £3 per ton (*l*).

Article 160.—*Damages for failure to load under Charter.*

In an action against charterer for not loading a cargo, the measure of damage is the amount of freight which would have been earned under the charter (*m*), after deducting the expenses of earning it, and also any net profit the ship may have earned during the period of the charter (*n*). It is probable that any freight the ship *might* have earned by reasonable diligence after the final breach is to be deducted also (*o*).

The owner or captain is not bound to accept another offer inconsistent with the charter before there has been a final breach of the charter by the charterer, accepted by himself (*p*): it is probable that after such final breach he is bound to do the best for himself and the charterer (*o*).

Case 1.—Charterers of a vessel, alleging that through delay in the ship's arrival they were not liable to load her, offered, before the expiration of the lay days, to provide a cargo if the master would go under protest to an island ninety miles off. *Held*, that the master was not bound to accept

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(*i*) On authority of Mellish, L.J., in *The Parana*, at p. 121, but a similar point was actually so decided by the Court of Appeal in an unreported case in 1881.

(*k*) *Featherston* v. *Wilkinson* (1873), L. R. 8 Ex. 122; see also *Parker* v. *James* (1814), 4 Camp. 112.

(*l*) *Rodoconachi* v. *Milburn* (1886), 17 Q. B. D. 316.

(*m*) As to method of calculation, see Article 144; and *Capper* v. *Forster* (1837), 3 Bing. N. C. 938; *Cockburn* v. *Alexander* (1848), 6 C. B. 791; *Warren* v. *Peabody* (1849), 8 C. B. 800; see also Mayne on Damages, p. 271.

(*n*) *Smith* v. *Maguire* (1858), 3 H. & N. 554; *Staniforth* v. *Lyall* (1830), 7 Bing. 169.

(*o*) See note 2, and cases cited: for special cases of damage, see *Sparrow* v. *Paris* (1862), 7 H. & N. 594; *Heugh* v. *Escombe* (1861), 4 L. T. 517.

(*p*) *Harries* v. *Edmonds* (1845), 1 C. & K. 686; *Hudson* v. *Hill* (1874), 43 L. J., C. P. 272.

such an offer, which he might reasonably believe would amount to rescinding the original charter (*q*).

Case 2.—A ship was chartered to go to X., where the charterer was either to load or to give notice that he would not load, paying at the same time £500. The ship went to X. The charterer neither loaded nor gave the notice; the ship returned by Y., making a larger freight than if she had returned straight from X. *Held*, that the shipowner could not recover the £500, as the charterer had given no notice, but only unliquidated damages, and that as he had profited by the breach, the damages were nominal (*r*).

Note 1.—"*To load in regular turn.*"—Where the "regular turn" is lost through the negligence of one of the parties, he will be liable for all subsequent delay resulting from such loss. Thus, a ship chartered to load in "regular turn" lost her turn through default of the charterer, and was detained eleven days till her turn came round again, when she was detained three days by weather before she could begin to load. *Held*, that the charterer was liable for the whole fourteen days' delay, the three days' delay being the legal and natural consequence of his first default (*s*).

Note 2.—In favour of estimating in reduction of damages, freight the master might reasonably have earned, is the case of *Harries* v. *Edmonds* (1845) (*t*): where a ship was chartered at 2*s.* 8*d.* per quarter to carry oats from X. to Z., six days being allowed for loading at X.; before the six days were up, the charterer's agent offered a cargo at 2*s.* 6*d.*, and said the charterer's broker would pay the difference. There was also an offer of a cargo at 2*s.* 2*d.*, conditional upon calling at Y. Both these offers were refused. After the lay-days expired, the captain had other offers, and ultimately took a cargo at 1*s.* 9*d.* *Held*, that the captain was not bound to accept either offer before the lay-days expired, but that after the lay-days expired he was bound to accept the best offer, so as to relieve the charterer as far as possible. This is supported by a *dictum* of Bramwell, B., in *Bradford* v. *Williams* (1872) (*u*): "the captain would clearly be bound to find some occupation for his ship, otherwise when he brought his action the charterer would have good cause to complain." In *Frost* v. *Knight* (1872) (*x*), Cockburn, C.J. said: "in assessing the damages for breach of performance, a jury will, of course, take into account whatever the plaintiff has done, or has had the means of doing, and as a prudent man ought in reason

(*q*) *Hudson* v. *Hill*, *vide supra*.

(*r*) *Staniforth* v. *Lyall* (1830), 7 Bing. 169; *Bell* v. *Puller* (1810), 2 Taunt. 286, where the charterer was allowed to earn both charter freight and freight *aliunde*, turns on an express proviso in the charter.

(*s*) *Jones* v. *Adamson* (1875), 1 Ex. D. 60; see also *Taylor* v. *Clay* (1846), 9 Q. B. 713.

(*t*) 1 C. & K. 686.

(*u*) L. R 7 Ex. at p. 262.

(*x*) L. R. 7 Ex. 111, at p. 115.

to have done, whereby his loss has been, or would have been, diminished."

On the other hand, in *Smith* v. *Maguire* (1858) (*y*), Martin, B. doubted "whether a party who breaks a contract has a right to say to the other party: 'I will not pay you the damages arising from my breach of contract, because you ought to have done something else for the purpose of relieving me of it.' I am not prepared to say that a shipowner who has lost his freight by reason of a breach of contract by the charterer, is bound to go and look for employment for his ship, so as to relieve the charterer from the consequences." In *Brown* v. *Muller* (1872) (*z*), where the contract was to deliver 500 tons of iron, one third in each of the months, September, October, and November, and in August the vendor gave notice that he did not mean to deliver any iron, it was argued that the purchaser should at once have made a new contract for such iron; but the Court held "that he was not bound to enter into such a contract, which might be either to his advantage or detriment, according as the market might fall or rise. If it fall, the defendant might fairly say that the plaintiff had no right to enter into a speculative contract, and insist that he was not called upon to pay a greater difference than would have existed had the plaintiff held his hand. . . . I do not think the plaintiff could be called upon to enter into a fresh contract. . . . and if it should happen that he might have done better for the defendant by waiting and making no speculative contract, the defendant would have in his turn a fair right to complain that his loss had not been mitigated as far as possible." Though the reasoning here seems at first sight to confirm the view taken by Martin, B., it will be noted that: (1) the right of the defendant to have his loss mitigated in some way is recognised; (2) there is a wide distinction between the refusal to load a ship, where there is at once a fixed maximum of damage, the freight, less the expenses of earning it, which may be lessened by substituted freight, less its expenses, and a refusal to deliver goods at some future period, where it is uncertain what the loss ultimately sustained will be, and where a heavy fall in the market may convert the purchaser's loss into a gain. While, therefore, the results of a new contract made on the breach of the old one, must, in the case of iron, be very speculative and uncertain, in the case of the ship such a contract will usually mean a reduction of damages. In *Roper* v. *Johnson* (1873) (*a*), where the facts were similar, the Court, in the absence of evidence that a new contract could have been obtained on terms that would mitigate the purchaser's loss, fixed the measure of damages at the difference between the contract-price and the selling-price on each day of delivery. But the judges

(*y*) 3 H. & N. 554, at p. 567. (*z*) L. R. 7 Ex. 319.
(*a*) L. R. 8 C. P. 167.

admitted that if the vendors had shown that the purchasers might have made a new contract to diminish their loss, such evidence would have been available in reduction of damages.

In *Wilson* v. *Hicks* (1857) (*b*): the question of what the captain could reasonably have done after breach was left to the jury, to aid them in estimating the damages. This case, however, seems directly contrary to *Harries* v. *Edmonds* (1845) (*c*), and *Hudson* v. *Hill* (*d*) in that the alternative proposals were made to the captain before his lay-days had expired. A similar question of reasonableness was raised in *Hudson* v. *Hill*. Mayne on Damages (4th ed. pp. 165, 275) treats the matter as unsettled.

Though the cases are inconsistent, the better opinion seems to be that freight, which a reasonable owner might and would have obtained after final breach, must be reckoned in reduction of damages, after deducting the expenses of earning it. It will certainly be safer for the captain to earn the best freight in his power.

So also, a shipper of goods must do what is reasonable to lessen his loss from a breach of contract by the shipowner; thus, he must purchase goods to supply the deficiency at the lowest price. If he can avoid delay by paying a small sum for dues, he should do so, recovering it from the shipowner; and he cannot recover damages for delay which he might have so avoided (*e*).

Article 161.—*Dead Freight.*

"Dead freight" is the name given to damages, whether liquidated or unliquidated, claimed for breach of a covenant in a charter to furnish a full cargo to a ship (*f*).

For such damages no lien on goods actually carried in the ship exists at Common Law (*g*); but such a lien may be given by usage, or express contract of the parties (*f*).

Case 1.—A vessel was chartered to carry a full cargo of bones at so much per ton, the shipowner to have a lien on the cargo for "freight, dead freight, and demurrage." Only 386 tons were shipped; 210 tons more could have been shipped. The master claimed a lien on the cargo shipped for damages for failure to ship the 210 tons. *Held*, that the charter gave him such a lien (*f*).

Case 2.—A ship was chartered to load a full cargo at named freights, "but if the ship should not be fully laden, C. to pay not only for the

(*b*) L. J. 26 Ex. 242.
(*c*) 1 C. & K. 686.
(*d*) 43 L. J. C. P. 273.
(*e*) *Möller* v. *Jecks* (1865), 19 C. B., N. S. 332; *Alexiadi* v. *Robinson* (1861), 2 F. & F. 679; *aliter* if the sum is exorbitant: see *The Norway* (1864), 12 L. T. at p. 62; and *per* M. Smith, J. at 19 C. B., N. S. p. 341.
(*f*) *M'Lean* v. *Fleming* (1871), L. R. 2 H. L. (Sc.) 128.
(*g*) *Phillips* v. *Rodie* (1812), 15 East, 547; *Birley* v. *Gladstone* (1814), 3 M. & S. 205.

goods which should be on board, but also for so much in addition as the ship could have carried. And in case no goods were shipped, then C. should at the end of the voyage pay full freight for the vessel to A. as if she had been fully loaded." A full cargo was not shipped, and the master claimed a lien on the goods carried for "dead freight" due for goods not carried. *Held*, that no such lien existed at common law (*h*).

Note.—It is doubtful whether the term "dead freight" must not be confined to damages ascertained or ascertainable by the charter itself, *i.e.*, liquidated damages for breach of covenant to furnish a full cargo. In support of this view we have the cases of *Pearson* v. *Goschen* (1864) (*i*), and *Gray* v. *Carr* (1871) (*j*). In *Pearson* v. *Goschen* there was a charter to load a full cargo at 90*s.* per ton, the master to have an absolute lien for all freight, dead freight and demurrage on the said cargo laden on board. Damages were claimed for short loading, and the cargo detained under the lien for "dead freight." The Court, Williams, Willes, Byles, and Keating, JJ., held that the term "dead freight" did not include "damages in respect of room lost in consequence of the charterers not loading according to the charter," and that, though there was nothing else in the charter for the term "dead freight" to apply to, the clause as to lien, being an ordinary printed clause, need not necessarily have a precise meaning given to every word in it. The next case in point of time was *McLean* v. *Fleming* (*v.s.*), a Scotch case, decided in May, 1871, where the House of Lords held that a lien for dead freight, meaning unliquidated damages, might be given by specific contract. Lord Westbury expressly dealt with the inconvenience of a lien for an unliquidated sum, by admitting it, but saying: "It was impossible to set up any consideration of inconvenience in answer to the clear terms of the contract." Lord Chelmsford rather weakened the judgment by saying that the case "could hardly be considered as one of unliquidated damages, because the proper measure of damages was the amount of the agreed freight on the deficient quantity of 210 tons," though, he added, whether the damages were liquidated or unliquidated, the charter gave a lien for them. Lord Westbury said that the calculation at the agreed freight per ton was not correct, as it took no account of the expenses of loading and carrying the 210 tons; and that, therefore, the damages must be unliquidated. Lord Colonsay also held it "equally clear in principle and authority that there might be, by express contract in the charter, a lien for unliquidated damages as "dead freight." The Lords expressly abstained from dealing with *Pearson* v. *Goschen*, on being informed that it was about to be considered in another case in the Exchequer Chamber. This was *Gray* v. *Carr*, (decided June, 1871): the arguments in this case were heard before the judgments in *McLean* v.

(*h*) *Phillips* v. *Rodie*. See note (*g*) *ante*, p. 259.

(*i*) 17 C. B. N. S. 352.

(*j*) L. R. 6 Q. B. 522.

Fleming, of which the judges appear to have seen a note, though not a very full one, and some of them in giving judgment expressly deal with the case. In *Gray* v. *Carr*, there was a charter to load a full cargo; an absolute lien on the cargo for all freight, dead freight, demurrage, and average; short shipment; and a lien claimed for damages *sub nomine* "dead freight:" the damages were not ascertainable from the charter. On these facts, Kelly, C.B., Channel, B., and Willes and Brett, JJ., held such a lien not sustainable, the damages claimed not being dead freight, while Bramwell and Cleasby, BB., dissented. The majority took the view that "dead freight" only meant liquidated damages, and distinguished *McLean* v. *Fleming*, on Lord Chelmsford's suggestion that the damages were there ascertainable from the charter. They dwelt on the inconvenience of a lien for an unascertainable amount, and met the argument that if "dead freight" did not mean this, there was nothing in the charter that it could mean, by the suggestion in *Pearson* v. *Goschen*, that in contracts written into a general printed form, it was not necessary to give a meaning to every word in print. They expressly followed *Pearson* v. *Goschen*. Of the minority, Bramwell, B., admitting it was not necessary to give every word in print a meaning, apparently held the point doubtful, but for *McLean* v. *Fleming* which bound him, while Cleasby, B., took the line that in *Gray* v. *Carr*, the "dead freight" was capable of liquidation with very little trouble.

Clearly, if the view of *McLean* v. *Fleming* taken in *Gray* v. *Carr* is correct, dead freight must be limited to "damages ascertained or ascertainable from the charter," and this construction would, I think, be far more convenient for mercantile purposes; but the judgment in *McLean* v. *Fleming* distinctly admit a lien for unliquidated damages by express agreement. It is, indeed, a decision in a Scotch case; but, "so far as it proceeds upon principles of general jurisprudence, it ought to have weight in England" (*per* Lord Selborne in *Ewing* v. *Orr-Ewing* (1885) (*k*), and the question was almost entirely discussed on the authority of the English cases. The early cases of *Phillips* v. *Rodie* and *Birley* v. *Gladstone* contain expressions supporting either view; but, on the whole, they favour the view of the House of Lords; and it is submitted that English Courts at the present day will be bound by *McLean* v. *Fleming*, and that *Pearson* v. *Goschen* and *Gray* v. *Carr* on this point must be treated as overruled.

(*k*) L. R. 10 App. C. 453, at p. 493.

APPENDIX I.

Forms of Bills of Lading and Charters.

I have not thought it necessary to set out a large number of bills of lading, though all the forms used by the leading shipowners of London and Liverpool have been considered in writing the previous pages. A collection of such bills will also be found in Mr. Leggett's book on Bills of Lading, but it is difficult to see how they increase the value of a work like this. The three bills which follow have, however, been agreed upon as a compromise by merchants and shippers in the particular trades to which they refer, and I have accordingly inserted them, adding references to the articles where each clause will be found discussed.

I have given two forms of charter, time and voyage, with similar references, and have also added what is known as the "negligence clause" in charters, which is now being pressed upon charterers by shipowners, especially in the American grain trade, and has been adopted by the New York Produce Exchange.

(A.) COAL BILL OF LADING, 1885.

SHIPPED, *in apparent good order and condition* (*a*), *by in and upon the good Vessel called the* (*b*) *now lying in the port of* (*c*) *and bound for* (*d*) *with liberty to call at any ports in any order, to sail without Pilots, and to tow and assist Vessels in distress, and to deviate for the purpose of saving life or property* (*e*); *and to be delivered in the like good order and condition at the aforesaid port of unto or to his or their assigns* (*f*), *freight and all other conditions as*

(*a*) Article 52.
(*b*) Article 26.
(*c*) Article 27.
(*d*) Article 23.
(*e*) Articles 99, 100.
(*f*) Article 56.

per Charter Party (a). The act of God (b), perils of the sea (c), fire (d), barratry of the Master and Crew (e), enemies (f), pirates, and thieves (g), arrests and restraints of princes, rulers, and people (h), collisions (i), stranding, and other accidents of navigation (c) excepted (j), even when occasioned by negligence, default, or error in judgment of the Pilot, Master, Mariners, or other servants of the Shipowners (k).

Ship not answerable for losses through explosion, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, not resulting from want of due diligence by the Owners of the Ship, or any of them, or by the Ship's Husband or Manager (l).

General Average payable according to York-Antwerp Rules (m).

In Witness whereof, the Master or Agent of the said Ship hath affirmed to three Bills of Lading, all of this tenor and date, drawn as first, second and third, one of which Bills being accomplished, the others to stand void (n).

Dated in this day of 188 .

WEIGHT, QUALITY AND CONTENTS UNKNOWN (o).

(B.) GENERAL PRODUCE, MEDITERRANEAN, BLACK SEA, AND BALTIC STEAMER BILL OF LADING, 1885.

SHIPPED, in good order and condition (p), by in and upon the good Steamship (q) now lying in the Port of (r) and bound for (s) with liberty to call at any ports on the way for coaling or other necessary purposes (t) being marked and numbered as per margin, and to be delivered in like good order and condition at the port of unto or to his or their assigns (u), he or they paying freight on the said goods on delivery (v) at the rate of and charges as per margin.

It is mutually agreed that the Ship shall have liberty to sail without Pilots; to tow and assist vessels in distress; to deviate for the purpose of saving life (t); to convey goods in lighters to and from the Ship at the risk of the Owners of the goods but at the Ship's expense; and in case the Ship shall put into a port of refuge for repairs, to tranship the goods to their destination by any other steamship (x).

The Act of God (y), Perils of the Sea (z), Fire (aa), Barratry of the Master and Crew (bb), Enemies (cc), Pirates, and Robbers (dd), Arrests and

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(a) Articles 19, 134.
(b) Article 80.
(c) Article 83.
(d) Article 87.
(e) Article 88.
(f) Article 81.
(g) Article 85.
(h) Article 82.
(i) Article 84.
(j) Articles 79, 91.
(k) Article 89.
(l) Articles 29, 89.
(m) Article 120.
(n) Article 125.
(o) Article 52.
(p) Article 52.
(q) Article 26.
(r) Article 27.
(s) Article 23.
(t) Articles 99, 100.
(u) Article 56.
(v) Article 145.
(x) Article 103.
(y) Article 80.
(z) Article 83.
(aa) Article 87.
(bb) Article 88.
(cc) Article 81.
(dd) Article 85.

Restraints of Princes, Rulers, and People (a) *and other Accidents of Navigation excepted* (b). *Strandings and Collisions* (c), *and all Losses and Damages caused thereby, are also excepted, even when occasioned by negligence, default, or error in judgment of the Pilot, Master, Mariners, or other Servants of the Shipowners* (d), *but nothing herein contained shall exempt the Shipowner from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage or ventilation, or by improper opening of valves, sluices, and ports, or by causes other than those above excepted, and all the above exceptions are conditional on the Vessel being seaworthy when she sails on the voyage, but any latent Defects in the Machinery shall not be considered unseaworthiness provided the same do not result from want of due diligence of the Owners, or any of them, or of the Ship's Husband or Manager* (e).

The Shipowner is not liable for Loss or Damage occasioned by Decay, Putrefaction, Rust, Sweat, Change of Character (f), *Drainage, Leakage, Breakage* (g), *or any loss or damage arising from the nature of the goods or the insufficiency of packages; nor for Land Damage; nor for the obliteration or absence of Marks or Numbers; nor for any loss or damage caused by the prolongation of the voyage.*

The Steamer, while detained at any port for the purpose of coaling, is at liberty to discharge and receive goods and passengers.

The goods are to be applied for within 24 hours of Ship's arrival and reporting at the Custom House, otherwise the Master or Agent is to be at liberty to put into lighters or land the same at the risk and expense of the Owners of the goods (h).

In case of quarantine at any port, the goods destined for that port may be discharged into quarantine depot, hulk, or other vessel, as required for the Ship's despatch. Quarantine expenses upon the said goods, of whatever nature or kind, shall be borne by the Owners thereof.

The Master or Agent shall have a lien on the goods for freight and payments made, if any, or liabilities incurred in respect of any charges stipulated herein to be borne by the Owners of the goods (i).

In case any part of the within goods cannot be found during the Ship's stay at the port of their destination, they are to be sent back by first Steamer, at the Ship's risk and expense, and subject to any proved claim for loss of market.

The Ship shall not be liable for incorrect delivery of packages unless each of them shall have been distinctly marked by the Shippers before shipment.

Should grain or seed be delivered in a heated or damaged condition, and the receivers claim to deduct half-freight upon such damaged or heated portion, it shall be at the Master's option either to allow the same, or to be paid full freight upon the quantity shipped according to the Bill of Lading, provided always that no portion of the same has been jettisoned or otherwise disposed of on the voyage and the quantity delivered exceeds the quantity named in the Bill of Lading.

General Average payable according to York-Antwerp Rules (j).

The Owner and Consignee of the goods, and Shipowner mutually agree to be bound by all of the above stipulations, exceptions, and conditions,

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(a) Article 82.
(b) Article 83.
(c) Article 84.
(d) Article 89.
(e) Articles 29, 89.
(f) Article 79, at p. 151.
(g) Article 86.
(h) Article 127.
(i) Article 157.
(j) Article 120.

notwithstanding any custom of the ports of loading and discharging to the contrary.

IN WITNESS whereof the Master or duly authorized Agent of the said Ship hath affirmed to three Bills of Lading, all of this tenor and date, one of which Bills being accomplished, the others to stand void (*kk*).

Dated in this day of 188 .

WEIGHT, QUALITY, AND CONTENTS, UNKNOWN (*ll*)

(C.) MEDITERRANEAN, BLACK SEA, AND BALTIC GRAIN CARGO STEAMER BILL OF LADING, 1885.

SHIPPED, *in good order and condition* (*a*), *by in and upon the good Steam Vessel called the* (*b*) *now lying in* (*c*) *and bound for* (*d*) *with liberty to call at any ports on the way for coaling or other necessary purposes, to sail without Pilots, and to tow and assist Vessels in distress, and to deviate for the purpose of saving life* (*e*); *and to be delivered in the like good order and condition at the aforesaid port of unto or to his or their assigns* (*f*), *he or they paying freight and or demurrage, if any, for the said goods* (*g*). *All conditions as per Charter Party, dated* (*h*). *The act of God* (*i*), *perils of the sea* (*k*), *fire* (*l*), *barratry of the Master and Crew* (*m*), *enemies* (*n*), *pirates, and robbers* (*o*), *arrests and restraints of princes, rulers, and people* (*p*), *and other accidents of navigation* (*k*) *excepted* (*q*). *Strandings and collisions* (*r*), *and all losses and damages caused thereby, are also excepted, even when occasioned by negligence, default, or error in judgment of the Pilot, Master, Mariners, or other servants of the Shipowners* (*s*), *but nothing herein contained shall exempt the Shipowner from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage or ventilation, or by improper opening of valves, sluices and ports, or by causes other than those above excepted, and all the above exceptions are conditional on the Vessel being seaworthy when she sails on the voyage, but any latent defects in the machinery shall not be considered unseaworthiness provided the same do not result from want of due diligence of the owners, or any of them, or of the Ship's Husband or Manager* (*t*).

General Average payable according to York-Antwerp Rules (*u*).

..... *laying days have been used at the ports of loading.*

IN WITNESS *whereof, the Master of the said Ship hath affirmed to three Bills of Lading, all of this tenor and date, one of which Bills being accomplished, the others to stand void* (*w*).

Dated in this day of 188 .

QUANTITY AND QUALITY, UNKNOWN (*x*).

(*kk*) Article 125.
(*ll*) Article 52.
(*a*) Article 52.
(*b*) Article 26.
(*c*) Article 27.
(*d*) Article 23.
(*e*) Articles 99, 100.
(*f*) Article 56.
(*g*) Article 135.
(*h*) Articles 19, 134.
(*i*) Article 80.
(*k*) Article 83.
(*l*) Article 87.
(*m*) Article 88.
(*n*) Article 81.
(*o*) Article 85.
(*p*) Article 82.
(*q*) Articles 79, 91.
(*r*) Article 84.
(*s*) Article 89.
(*t*) Articles 29, 89.
(*u*) Article 120.
(*w*) Article 125.
(*x*) Article 52.

(D.) CHARTERPARTY (FOR A VOYAGE).

London 188 .

IT IS THIS DAY MUTUALLY AGREED BETWEEN Owner of the Good Steam Ship or Vessel called the (*a*) of and That the said vessel being of Tons Register measurement, or thereabouts (*b*), classed (*c*) now at (*d*) and guaranteed to be in (*d*) ready to load (*e*), by the (*d*) and being tight, staunch, and strong, and every way fitted for the Voyage (*f*), shall at once sail and proceed to (*g*) and enter such Dock as directed on arrival, by and there take on board, as tendered (*h*), a full and complete Cargo (*h*) of say Tons (*h*), not exceeding what she can reasonably stow and carry over and above her Tackle, Apparel, Provisions, and Furniture. Cargo to be loaded in running hours (Sundays and Holidays excepted) (*i*), from the time true written notice is given (*k*) (between 9 a.m. and 5 p.m.) that all Ballast or Inward Cargo is discharged, and the Vessel is ready to receive or deliver her Cargo (*e*) (any time lost through riots, strike, lock-out, or by reason of accidents to mines or machinery, obstruction on the Railway and the Docks, or by reason of floods, frosts, storms, or any cause beyond the control of the said (*l*) not to be computed as part of the aforesaid loading and discharging time). Unloading at the rate of Tons per working day. Time to commence from when the Vessel is ready to unload, as ordered, and written notice is given (*m*).

The time for loading not to count from 5 p.m. on any Saturday till 7 a.m. on the following Monday, nor till 7 a.m. after any Holiday (*i*).

The Captain shall, before the ship proceeds to Sea, call at the Office of the Charterers' Agents in and there sign, as presented (*n*), the Merchants' Bills of Lading for the Cargo, as per Dock or Railway Company's return; and in default there shall be payable to the Charterers the sum of Twenty-five pounds.

The Freight being in full of all Dock Wharfage on Cargo, Consulages, Lights, Pilotage, and all other Port Charges whatsoever.

The Vessel being loaded shall, with all practicable despatch (*o*), proceed to and deliver the same to the said Freighter or Assigns, alongside Steamer, Depot Ship, Wharf, Arsenal, or into Craft, as ordered, where she can safely deliver (*p*).

(The Act of God (*q*) the Queen's Enemies (*r*), restraint of Princes and Rulers (*s*), Fire (*t*), and all and every other Dangers and Accidents of the Seas, Rivers, and Navigation (*u*), and to Machinery and Boilers, of what nature and kind soever during the said Voyage, always excepted.) (*w*)

Cargo to be brought and taken from alongside (*x*) at Merchant's risk and expense.

(*a*) Article 26.
(*b*) Articles 25, 46.
(*c*) Article 24.
(*d*) Article 27.
(*e*) Article 40.
(*f*) Article 29.
(*g*) Articles 30, 33.
(*h*) Article 46.
(*i*) Article 130.
(*k*) Article 41.
(*l*) Article 42.
(*m*) Article 124.
(*n*) Article 20, p. 45.
(*o*) Articles 30, 99, 100.
(*p*) Article 37.
(*q*) Article 80.
(*r*) Article 81.
(*s*) Article 82.
(*t*) Article 87.
(*u*) Article 83.
(*w*) Articles 79, 91.
(*x*) Article 43.

Freight to be paid on the unloading and right delivery (*y*) *of the Cargo at the rate of Shillings and Pence, per Ton of* 20 *cwt. delivered* (*z*).

One-third Freight, if required, in Cash, on signing Bills of Lading, less 3½ per cent. for Insurance, &c. Sufficient Cash for Vessel's ordinary disbursements at current rate of exchange, at Port of Destination, and the remainder by Bill on Charterers, at Three Months' date, on the right delivery of Cargo as aforesaid (*a*).

The Ship to be addressed to Charterers' Agents, at Port of Discharge, free of charge, paying the usual Address Commission of 2 per Cent. when loaded, and to employ their broker, paying usual charge for doing Ship's business.

In case of Average, same to be settled in accordance with the British Law and Custom (*b*).

The Cargo to be discharged, weather permitting, out of all her hatchways simultaneously, if practicable, and required by Charterers' Agents.

Demurrage in loading, over and above the said lying time, at per hour; Demurrage on unloading at the rate of per hour.

Owners of Vessels to have a lien on the Cargo for freight (*c*), Dead Freight (*d*), and Demurrage (*e*); Charterers' liability ceasing when Cargo shipped (*f*).

The Commission on this Charter Party is on the amount of Freight, and is due on the signment hereof (Ship lost or not lost) to and the Ship is to be entered and cleared at the Custom-House, at her Port of Loading, by Charterers' Agents.

If any misrepresentation be made respecting size, the position, or state of the Steamer, Charterer to have the option of cancelling this Agreement (*g*).

Penalty for non-performance of this Agreement, estimated amount of Freight.

(E.) TIME CHARTERPARTY.

London 188 .

It is this day mutually agreed between of the good Iron Screw Steam Ship called the (*h*) of Tons gross Register, and Tons nett Register (*i*), having engines of horses' power (*j*), and classed at Lloyd's Years, or Years in Liverpool Book, now and during hiring (*k*), of Tons dead weight or thereabouts, inclusive of fuel and stores, &c., now (*l*) and Messrs. Charterers.

Witnesseth,

That the said Owners agree to let, and the said Charterers agree to hire the said Steam Ship for the term of calendar Months, from the day of for a voyage from to and back to , she being then placed at the disposal of the Charterers, at , in such Dock,

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(*y*) Article 157.
(*z*) Articles 46, 144.
(*a*) Article 137.
(*b*) Article 120.
(*c*) Articles 150, 155.
(*d*) Article 161.
(*e*) Article 155.
(*f*) Articles 53, 54.
(*g*) Article 23.
(*h*) Article 26.
(*i*) Articles 25, 46.
(*j*) Article 23.
(*k*) Article 24.
(*l*) Article 27.

or at such safe (*m*) Wharf or place (where she may always safely lie afloat), as Charterers may direct, she being then ready to receive Cargo (*n*), and being tight, staunch, strong, and every way fitted for the service (and with full complement of officers, seamen, engineers, and firemen for a Vessel of her tonnage) (*o*); to be employed in carrying lawful merchandise (excluding ore, salt, petroleum and its products, and all other injurious cargoes), between such Ports within the following limits, viz.: with the option to the Charterers to send the Steamer to as the Charterers or their Agents shall direct, on the following conditions:—

That the Owners shall provide and pay for all the provisions and wages of the Captain, Officers, Engineers, Donkey Enginemen, Fireman and Crew; shall pay for the insurance of the Vessel; also, for all engine-room stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the service. That the Charterers shall provide and pay for Coals as stated below, Port Charges, Pilotages, Agencies, Commissions, and all other charges whatsoever, except those before stated.

That the Charterers shall accept and pay for all Coal in the Steamer's Bunkers; and the Owners shall, on expiry of this Charterparty, pay for all Coal left in the Bunkers at the current market prices at the respective ports when she is delivered to them.

That the Charterers shall pay for the use and hire of the said Vessel at the rate of per gross register Ton per Calendar Month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month; hire to continue until her delivery to the Owners (unless lost) at London.

Should the Vessel be lost without being heard of, hire shall cease to be due fifteen days after the date on which she left her last Port (*p*).

Should the Steamer occupy a longer period than days between , hire shall be remitted for an excess of time beyond the days named. Any time lost at Port of call to be excluded from the above guaranteed passage (*p*).

That in the event of loss of time from deficiency of men or stores, breakdown of machinery, or damage preventing the working of the Vessel (when in port) (*p*) for more than twenty-four working hours, the payment of hire shall cease until she be again in an efficient state to resume her service.

The Charterers are to put on board in London tons Coals ( ) for Ship's use for the Voyage out and home, and which is to include the working of the Donkey Engines. Should this quantity be insufficient, the Owner of the Steamer undertakes to pay the cost of any further quantity (*p*). The time of sailing from to be reckoned from the time the Captain receives his dispatches on board, and the loading complete. The steam winches and cranes to be in efficient working order when in port.

Payment of the said Hire to be made in London, monthly, in advance, by Charterers' acceptance at thirty days' date, and in default of such payment the Owners shall have the faculty of withdrawing the said Steamer from the service of the Charterers without prejudice to any claim they, the Owners, may otherwise have on the Charterers, in pursuance of this Charter, any payment for part of a month to be calculated at thirty days to the month.

That the cargo or cargoes may be laden and or discharged in any dock, or at any wharf or place that the Charterers or their Agents may direct, provided the Steamer can always safely lie afloat (*n*).

(*m*) Article 37.
(*n*) Article 40.
(*o*) Article 29.
(*p*) These clauses are unusual.

That the whole reach of the Vessel's Holds and usual places of loading and accommodation of the Ship (*q*) (not being more than she can reasonably stow and carry) shall be at the Charterers' disposal, reserving only proper and sufficient space for Ship's officers, crew, tackle, apparel, furniture, provisions, stores, and fuel.

That the Captain shall prosecute his voyages with the utmost despatch (*r*), and shall render all customary assistance with Ship's crew and boats.

That the Captain (although appointed by the Owners) shall be under the orders and direction of the Charterers as regards employment, agency, or other arrangements; and the Charterers hereby agree to indemnify the Owners from all consequences or liabilities that may arise, from the Captain signing Bills of Lading, or in otherwise complying with the same (*s*).

That if the Charterers shall have reason to be dissatisfied with the conduct of the Captain, Officers, or Engineers, the Owners shall, on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments.

That the Master shall be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and correct Log of the voyage or voyages, which are to be patent to the Charterers or their agents.

That the Charterers shall have the option of continuing the Charter for a further period of on giving notice thereof to the Owners previous to the expiration of the first-named term.

That should the vessel be lost, freight paid in advance, and not earned (reckoning from the date of her loss), shall be returned to the Charterers. The Act of God (*t*), the Queen's Enemies (*u*), Fire (*x*), Restraints of Princes, Rulers, and People (*y*), Detention of Railway Trucks, Frost, Strikes (*z*), and all other dangers and accidents of the sea, rivers, machinery, boilers, and steam navigation, (*a*) throughout this Charterparty always excepted (*b*).

That should any dispute arise between the Owners and the Charterers, the matters in dispute shall be referred to three persons at London, one to be appointed by each of the parties hereto, and the third by the two so chosen, their decision, or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of Court.

That the Owners shall have a lien upon all cargoes, and all sub-freights, for any amounts due under this Charter; and Charterers to have a lien on the Ship for all moneys paid in advance and not earned (*c*).

All derelicts and salvage shall be for Owners' and Charterers' equal benefit (*d*). Penalty for non-performance of this Contract, estimated amount of damages.

A Commission of Five per Cent. on the estimated amount of Freight is due on signment hereof to (*e*) Ship lost or not lost.

(*q*) Article 48.
(*r*) Articles 30, 99, 100.
(*s*) Articles 18, 20.
(*t*) Article 80.
(*u*) Article 81.
(*x*) Article 87.
(*y*) Article 82.
(*z*) Article 42.
(*a*) Article 83.
(*b*) Articles 79, 91.
(*c*) Articles 156, 157.
(*d*) Article 121.
(*e*) Article 16, p. 29.

(F.) "NEGLIGENCE CLAUSE."

"It is also mutually agreed that the Carrier shall not be liable for loss or damage occasioned by causes beyond his control (*a*), by the perils of the sea or other waters (*b*), by fire from any cause (*c*), or wheresoever occurring, by barratry of the master or crew (*d*), by enemies (*e*), pirates or robbers (*f*), by arrest and restraint of princes, rulers, or people (*g*), riots, strikes or stoppage of labour, by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances (*h*), by collisions (*i*), stranding, or other accidents of navigation (*b*) of whatsoever kind (even when occasioned by the negligence, default, or error of judgment in the pilot, master mariners, or other servants of the shipowner), not resulting, however, in any case, from want of due diligence by the owners of the ship or any of them, or by the Ship's Husband or Manager" (*k*).

(*a*) Act of God; see Article 80.
(*b*) Article 83.
(*c*) Article 87.
(*d*) Article 88.
(*e*) Article 81.
(*f*) Article 85.
(*g*) Article 82.
(*h*) Article 29.
(*i*) Article 84.
(*k*) Articles 29, 89.

APPENDIX II.

Practice in loading and discharging general Ships in the leading ports of Great Britain.

THE following accounts of the customs of the ports of London, Liverpool, Bristol, Glasgow, and Hull, as they exist in 1886, have been carefully compiled, and revised by merchants in those ports. They apply in the absence of any special agreement or custom in any particular trade. It is hoped they will be useful both to merchants and shipowners not belonging to those ports, and to lawyers.

(A.) PRACTICE OF PORT OF LONDON.

I.—IN LOADING.

The shipper has sometimes "engaged" so much goods in the ship beforehand by agreement with the shipowner or shipbroker, such agreement, in the absence of express stipulations, being understood to be on the terms of the printed bill of lading of the line or firm, if, as is usually the case, there is such a printed bill, or, if not, on reasonable and ordinary terms of shipment. But not unfrequently no previous engagement of goods takes place.

I. *Goods sent by land to the ship*—

The shipper, or the shipper's agent, acting on instructions for shipping forwarded to him by the shipper, sends the goods to the dock where the ship is to load.

(1.) *If they are sent by road*, the carman has with him a "*shipping note*":—

"To the Superintendent of the X. Docks. Please receive the undermentioned packages to be shipped on board the *S.*" (here follows description of marks, numbers, and packages). "From F., shipper."

The carman has also a "*cart-note*," or ordinary form of receipt for the goods. The servants of the dock company sign the "*cart-note*," and return it to the carman, keeping the *shipping note* as their authority for receiving and shipping the goods. On the next day the dock company forward to F., the shipper, the account of their *dock charges*, known as the *wharfage note*, which also acknowledges receipt of the goods, and corresponds to the

mate's receipt. The goods are not shipped till these charges are paid; but to prevent delay, large shippers have a deposit account with the dock company, and make out the shipping-note, "charges to our deposit account;" or the broker loading the ship guarantees to the dock company the dock charges on all goods shipped in his ship.

(2) *If the goods are sent by rail*, there is no *shipping note;* the railway rate covers the dock charges, and the shipper has no intimation of the arrival of the goods at the dock from the dock company, but receives an *advice note* from the *depôt* of the railway that the goods have come to hand and have been forwarded as addressed.

Goods at the dock are "tallied" by the shipowner, either when put on board, or on delivery into the dock shed, at the ship's option; where the tallying takes place makes no difference in the shipowner's liability, though it may render it more difficult for him to prove the goods were lost before shipment if he does not tally into the ship. If tallying is omitted, the production of the "dock charge" or *wharfage note* by the shipper is usually accepted by the shipowner as entitling him to bills of lading. When all the land-borne goods are loaded, the dock company present to the mate for signature a list of such goods thus:

"X. Export Docks. Received from the X. Docks, the under-mentioned goods on the ship *S.*, master E., bound for Z. Marks. . . . Nos. . . . Packages. . . . Shippers. . . . In good order. Contents unknown" (*a*).

The dock company do not deliver goods to the ship unless they are in apparent good order, without having had direct instructions from the shipper or shipowner.

The shipper then purchases a printed form of the bill of lading of the particular line or firm, fills it up with particulars of the goods shipped, and leaves it for signature at the office of the shipowner or broker. It is there checked, usually with the "tally-book" kept by the ship, signed, if found correct, and delivered to the applicant without his necessarily producing any document or receipt. In this there is obviously some risk of a fraudulent application, but in practice it is slight.

II. *Goods sent to Ship by Water.*

With these the dock company have nothing to do, and they can make no charge for them. The lighterman bringing the goods delivers an order or *receiving note:* "Please receive in good order on board ship *S.*" (particulars of goods), "F. shipper." The mate signs a *receipt* (*b*), "Received in good order," &c., making a note on the receipt of any goods damaged. A receipt without such note is a "clean receipt," and some orders to ship have a clause, "No goods to be taken on board for which a

(*a*) See Article 52. (*b*) See Article 51.

clean receipt cannot be given, or ship will be held responsible.'

The ship is entitled by custom to keep the lighter alongside for three days free, after which *demurrage* becomes payable at the customary rate of 7*s.* 6*d.* per day per barge, but this is often modified in practice (*c*) or by special agreement.

The ship forwards the *receiving note* to the broker's office, and the broker delivers the bill of lading, which has been previously left, filled up by the shipper on the firm's printed form, to the producer of the *mate's receipt* or to the shipper (*d*).

Labour.—The dock company unload from carts, warehouse, and truck the goods loaded from the shore on to the quay at the shipper's expense. They are then slung, lowered into the hold, and stowed by a stevedore employed by the ship. Where the lowering is done by the dock cranes, the dock company charge the stevedore for their use, and guarantee the soundness of machinery and gear, but do not take the risk of working them. The stevedore is instructed as to place of stowage by a representative of the shipowner or broker, but not as to the method of stowage.

Water-borne goods are slung in the lighter, raised, lowered, and stowed by the stevedore; the ship's hand-winch or crane is used; the ship guarantees soundness of the gear she supplies, and the stevedore finds the labour, but the exact proportions in which gear is supplied by the stevedore or the ship vary very much.

Practice in unloading at the Docks in London.

On the arrival of the ship in dock the captain, broker, or owner hands to the dock company a "stop for freight," as follows (*e*):—

"To the Directors of the Z. Dock.

"I hereby give you notice to detain all the undermentioned goods, excepting samples of the same, which shall be landed in your docks, and now on board the ship *S.* from X., until the freight due thereon as herein specified shall be duly paid or satisfied, in proof of which you will be pleased to receive the directions of Messrs. B.

"*Signed* (captain, owner, or broker)."

Particulars of goods and amount of freight claimed follow. These may be filled in "all goods landed, freight as per bill of lading" to cover the whole cargo.

The vessel is "reported" at the custom house by her master,

(*c*) Thus for railway barges demurrage is 10s. per day; for sailing barges it is 20s.

(*d*) See Article 51. "Mate's receipt."

(*e*) As to the statutory effect of this: see 25 & 26 Vict. c. 63, s. 68, Appendix III.

and is then ready to deliver. By the custom of the port of London, unless modified by special customs in particular trades (*f*) or docks (*g*), or express stipulations (*h*), the consignees have forty-eight hours from the report to pass the entries of their goods at the custom house, and take delivery (*i*). From the expiration of that time warehouse charges at the docks, and the cost of delivery into lighters must be paid by the consignee.

The consignee can do one of two things:—

(1.) Without having his goods warehoused at the dock, he can send a barge alongside the ship, and take the goods out of dock for landing at a wharf. This is known as an "*overside entry.*"

(2.) He can warehouse his goods at the dock, on their being landed on the quay: known as a "*landing entry.*"

The stop for freight at the dock only applies to "*landing entries.*"

I. In *overside entries* the consignee takes his bill of lading to the office of the owner or broker, and, if the freight is unpaid, either by payment of freight, or on credit at the risk of the broker, gets in exchange for it an "overside pass" (*k*).

"To the chief officer, ship *S.*, from X.

"You may pass overside for Z. wharf" (goods described as in bill of lading).

In such a case the lighterman lodges the overside pass with the ship, and delivery is made by the Dock Company, the mate tallying the goods; or the tallying may be done by the Dock Company, for an extra charge. The ship takes a receipt: "Received of G., *ex* s.s. *S.*" (goods described) "in craft

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(*f*) *E. g. Aste* v. *Stumore* (1884), 1 C. & E. 319, in the grain trade; *Marzetti* v. *Smith* (1884), 49 L. T. 580. In the fruit trade an attempt to prove a varying custom failed in *The Clan Macdonald* (1883), L. R. 8 P. D. 178.

(*g*) As in *Petrocochino* v. *Bott* (1874), L. R. 9 C. P. 355, where a custom of twenty-four hours was proved by the Victoria Docks. The dock companies generally endeavour to establish a custom of twenty-four hours, but this is resisted by merchants, and some friction at present (1886) exists on the point.

(*h*) For special stipulations in the bill of lading, see note 1, *ante*, p. 207. The dock companies allow seventy-two hours to some large companies, as the Peninsular and Oriental, by special agreement.

(*i*) In *Pollitzer* v. *S.S. Cascapedia* (1886), 2 Times L. R. 413, under a bill of lading, "goods to be delivered from the ship's tackle;" attempts to prove on the one hand a custom of the port of London, that if a barge of sufficient size to take all the goods under a number of bills of lading was sent, the consignee's duty was discharged, though the ship might be discharging from several hatches at once; and, on the other hand, a custom that, if necessary, a separate barge must be sent for each bill of lading, both failed. The Divisional Court held that it was a question for the jury whether the consignees had taken delivery in a reasonable time.

(*k*) The delivery of an overside pass to a merchant does not terminate the transit, so as to prevent stoppage *in transitu*: *Coventry* v. *Gladstone* (1868), L. R. 6 Eq. 44.

R." *Signed* "L., lighterman;" and the ship's clerk gives a pass: "To Superintendent of Z. dock. Please pass out with" (goods described) "*ex* s.s. *S. Signed*, (clerk.)"

Overside passes are also granted to a wharf, filled up, "All produce entered by Z. wharf." In such a case the wharfinger guarantees to hold the goods until a release for freight by the broker or shipowner is presented; and no new "stop for freight" is therefore necessary, though such an overside pass is obtained by the wharf without payment of freight.

In the case of overside goods, to give despatch, by custom (*l*) or special agreement, they may be landed on the quay for assortment, and delivery made on overside passes from the quay, for an additional rate paid by the shipowner to the dock company, the consignee incurring no extra expense if he takes the goods within a time, customarily forty-eight hours, but varying according to particular custom or express stipulation (*m*).

In such a case, under the customary clauses in London bills of lading, the liability of the shipowner terminates on discharge from the ship's deck (*n*).

When goods, having been so landed, are delivered from the quay to lighters on overside passes, the dock company do not take a receipt from the lighter, but if their charges have been paid, give a pass:—"Z. dock. Pass for overside goods. Pass" (barge named) "with goods described below. Ship *S.* Master E. From X." The quantity and description of the goods is filled in the pass, the condition of the goods being ascertained at the wharf.

This pass is signed by the master of the ship or ledger clerk, and finally examined and passed by the dock constable at the locks.

By custom the West India and London Dock Companies deliver to each other's order goods entered for their respective docks without the production of overside passes from the brokers. In this case it is necessary for the broker or captain to serve a "stop" for freight on each dock, as the "stop" in one dock is not effectual in the other against the holder of the bill of lading demanding delivery.

II. *Landing entries.*—If the goods are entered for landing, the consignee hands to the dock company a customs permit, and takes his bill of lading to the broker's office; on presenting it, and, if the freight is unpaid, either on credit at the risk of the broker, or by payment he obtains a "*Release for freight.*"

"Removal of stop for freight. To Z. Dock Co.
"A stop for freight having been laid on the undermentioned

(*l*) See *Petrococchino* v. *Pott* (1874), L. R. 9 C. P. 355; *Marzetti* v. *Smith* (1884), 49 L. T. 580; *Aste* v. *Stumore* (1884), 1 C. & E. 319.
(*m*) See above, pp. 207, 275.
(*n*) *Petrococchino* v. *Bott*, *vide supra*.

goods, *ex S.*, captain E., from X.; you are now authorised to remove such stop from the same." Filled in: "All produce entered by G.," the specific description being contained in the bill of lading.

The consignee does not give up the bill of lading to the broker, but presents it to the dock with the "Release for freight."

If forty-eight hours (*o*) have expired from the report of the ship, the goods have been warehoused, weighed, and perhaps coopered and sampled, for which the consignee is charged by the dock company.

The dock company and the wharf furnish the consignee with particulars of goods consigned to him, and also the broker with a duplicate for purposes of freight. The docks add a statement of the goods damaged: the wharves do not inform the broker of damages.

The dock company's ship surveyors are called in during the discharge of the ship, whenever necessary, to survey damage. The shipowner's liability is practically terminated by correct delivery from the ship according to the "Landing account" (*p*), which is made up by the dock officials as the ship discharges.

Case 1.—Goods were shipped under a bill of lading "to be delivered at the port of London from the ship's deck where the ship's responsibility shall cease." The ship went into dock, and notice was given to the consignee of sixty-nine bales that she was ready to unload. Within twenty-four hours the consignee sent a lighter. According to the custom of the dock, the sixty-nine bales had been landed by the dock company's servants on the quay; but they only delivered sixty-eight bales to the lighter. *Held*, that the bill of lading, together with the custom, freed the ship from liability for the missing bale (*q*).

Case 2.—A custom of the port of London that steamships with a general cargo should unload on to the quay, and thence into lighters at the shipowner's expense, was proved, and *Held* consistent with a bill of lading containing the clause, "to deliver from the ship's tackles where the ship's responsibility shall cease," which meant "from tackles on to quay:" and "the goods to be discharged from the ship as soon as public intimation is given that she is ready to unload, and if not, thereupon removed without delay by the consignee, the master or agent to be at liberty to land the same, or, if necessary, to discharge into lighters, at the risk and expense of the owner of the goods" (*r*).

Labour in Discharging.—Small vessels are discharged by their own crews, but all ships in the London and East and West

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(*o*) See Note 1, p. 207, and p. 275, for variations.
(*p*) See Note 2, p. 207.
(*q*) *Petrococchino* v. *Bott* (1874), L. R. 9 C. P. 355.
(*r*) *Marzetti* v. *Smith* (1884), 49 L. T. 580. See also *Aste* v. *Stumore* (1884) 1 C. & E. 319; *Clan Macdonald* (1883), L. R. 8 P. D. 178.

India Docks are discharged by the servants of the dock companies, who dispute the right of the owner to employ any labour other than his crew in discharging; and though this claim of the Dock Companies is not acquiesced in by shipowners, and appears not warranted by law (*s*), it is rarely resisted in practice.

The dock company charge the shipowner one rate, the "landing rate," varying according to the class of goods, which covers the cost of discharge, craneage, the landing tally, and the damage reports.

B. Practice of the Port of Liverpool.

I.—*In loading general Ships.*

All the docks and sheds at Liverpool belong to the "Mersey Docks and Harbour Board." Some of the docks, which are known as "closed docks," are worked on a system similar to the docks in London, but they are only used for discharging and stiffening ships, or putting some ballast into a ship when discharged. All ships are loaded in the "open docks." Here the Harbour Board find quay space and goods sheds, for which they are paid by tonnage dues from ships, dock and town dues from goods paid by the shipper when the goods are entered at the custom house, and special rents from appropriated berths let by the year to the large companies and steamship owners. All loading is done by the shipowners and their servants, subject to this, that a master stevedore, must be employed for the loading of every vessel, and that only those licensed by the Harbour Board may act as master stevedores. But some of the steamship owners of the port are themselves master stevedores, and may employ under them whom they please. The effect of these provisions is thus to ensure that the loading of all ships in the port, is in the hands of responsible persons.

1. *Goods brought by land.*—The shipper sends the goods to the berth and puts them on the quay; the carter bringing the goods delivers a *shipping-note*, which either the mate or the wharfinger signs; after this the goods are at the ship's risk, in the absence of express exceptions. The wharfinger measures the goods and sends a return to the broker's office. The stevedore

(*s*) See *Dick* v. *Badart* (1883), L. R. 10 Q. B. D. 387, in which a by-law of the Surrey Commercial Dock, that no lumpers, but such as were authorized by the company, should be allowed to work on any vessel in the dock, except by special permission of the company, and that only servants of the company should be allowed to work on the dock premises, was held invalid and *ultra vires*.

puts the goods on board. Both wharfinger and stevedore are appointed and paid by the ship.

II. *Goods brought by water*—Are taken from the lighter's deck by the ship's stevedore, and tallied on board by one of the ship's officers, who gives a receipt to the lighterman.

Except in licensing the master stevedore, and in the provision of some staging the Dock Board have nothing to do with the loading of ships in open docks, the shipowner finding all the labour.

II.—*In Discharging general Ships.*

All the docks and sheds at Liverpool belong to the "Mersey Docks and Harbour Board." The docks are divided into two classes, "closed" and "open" docks. The "closed" docks, which are only used for discharging and stiffening ships, are worked by the Dock Board on a system similar to the docks in London; the Board discharge the ship and deliver the cargo to the consignees. In the "open" docks, all the labour for discharging is provided by the shipowner. The goods are unloaded on to the quay by a master lumper, and are received on the quay, weighed, and "loaded off," or delivered to the consignee at the dock by a master porter. All master lumpers and master porters must be licensed by the Harbour Board, and are subject to by-laws framed by that body. But some of the Liverpool steam shipowners are themselves licensed master porters, and master lumpers, employing whom they please under them, and themselves delivering the cargo to the consignee. Goods are nearly always landed on the quay, but if delivered into craft overside, the master porter weighs them on the ship's deck. The consignee pays no wharfage for his goods if removed within seventy-two hours from the end of the working day on which they were landed, except in the case of sailing ships in berths not appropriated to particular lines or shipowners, goods from which have only forty-eight hours. The use of the docks and sheds up till this time is paid for by tonnage dues on the ship, town and dock dues on the goods, paid when they are entered at the customs. After the expiration of the seventy-two or forty-eight hours, the consignee must pay a special rate for goods not then removed, and the master porter is not bound to deliver such goods to him without further payment.

This system does not affect the legal liability of the shipowner, prior to the delivery of goods to the master porter. The liability of the latter is for damage to the goods during his receiving them, weighing, and loading them off (*t*).

(*t*) *The Emilien Marie* (1875), 44 L. J. Adm. 9.

C. Practice of the Port of Bristol.

I. *In Loading general Ships.*—The quays and sheds of Bristol Old Dock, Avonmouth and Portishead, belong to the corporation and are worked by a Docks Committee.

The goods are handled on the quay at shipper's expense, as it is his duty according to the custom of the port to bring the cargo to the ship's rail, where it is received by the ship; the shipowner, therefore, only pays the stevedore for receiving it from the rail of the ship and stowing it on board. As a matter of convenience, merchants usually either arrange with the ship's stevedore or pay the owner 6*d.* per ton for lifting the goods from the wharf to ship's rail.

At present there are no export dues at this port either on ship or cargo.

II. *In Discharging general Ships.*—According to the custom of the port, the merchant has to receive the cargo from the ship's rail, except in cases where it is weighed on deck; in that case the merchant supplies the scales and sends his own men to weigh the cargo and receive it from the scales.

When cargo is weighed alongside the merchant either sends his own men to receive it from the ship's rail and to land and weigh it, or the ship arranges for the stevedore to land the goods, for which the merchants pay 6*d.* per ton.

In the case of cargo that has not to be weighed, but has to be taken from the ship to truck or shed, this is done by the ship's stevedore, and 6*d.* per ton is paid by the merchant for the service.

With cargoes of grain in bulk, the merchant sends men into the hold to bushel the grain; the ship's stevedore hoists it out of the hold to the scales on deck, where his duty ends.

In case of bag grain from India, it is usual to land the bags whole; the ship hoisting them out of the hold and delivering them to the scales or ship's rail, but bagged grain from America is usually started in the hold by the merchant's men, and brought underneath the hatchway by ship's men, and then dealt with in the same way as grain in bulk.

With cotton seed and valonia cargoes the ship's men have to fill into sacks in hold and deliver to scales on deck or ship's rail.

With deal cargoes, the ship lands them end on with her derrick ashore or on raft where merchant's men receive, the ship placing one man alongside to turn them over on the landing men's shoulders.

Balk timber is put into the water by the ship's gear, the ship's men raft it, providing grass rope for this purpose, merchants provide dogs. The timber is in charge of ship until measured.

There is no wharfage payable by the ship, but only dock dues.

Wharfage, town dues, &c., are payable on goods according to a scale.

A question which has been disputed for some time in the port of Bristol has just been settled by the case of *Taylor, Abrahams & Co.* v. *Budgett* decided at the Bristol Summer Assizes in 1886, and reported in the *Bristol Mercury* of August 3 and 4 of that year. In 1881 a trade in grain between India and Bristol arose, and from that date till 1886 corn merchants at Bristol had endeavoured to enforce an alleged custom by which the ship was not entitled to deliver her cargo as fast as she could put it out, but only at an average rate of 1000 quarters a day, so that the merchant detained the ship as many days as there were thousands of quarters of wheat in her cargo; if the ship wished to deliver quicker the consignee required that despatch money should be paid to him. On the question of the existence of this custom being brought to trial in 1886, on a charter with the clause "to discharge without delay and according to the custom of the port," a Bristol jury found that there was a usage to that effect, which had not yet become a custom, and the judge held that such a custom, if proved, would be unreasonable, and therefore bad at law.

D. Practice of the Port of Glasgow.

I. *In Loading.*—All the docks and quays at Glasgow belong to and are administered by "The Clyde Navigation Trust." They are all tidal docks, and, except in a few berths of 18ft., no vessel drawing over about 15 feet can load "always afloat."

The use of the quays and sheds is paid for by dues on the net register tonnage of vessels, paid by their owners, and by dues on goods carried, paid by the merchant, either direct to the Navigation Trust or through the shipowner, who by shipping goods before satisfying himself that the dues are paid, becomes liable to the trustees for the dues on all goods carried by his steamer. In the case of through rates, and by custom in a few trades, the freight includes the dues.

The goods are carted on to the quay by the shipper, weighed at the "weighs" of the trustees to ascertain the dues payable, and laid down in the shed by the shipper's carter, where they are tallied, measured, and signed for by the ship. The shipowner handles them on the quay and loads them.

Water-borne goods are rarely seen at Glasgow, but if so carried the lighter's crane must land them either on the steamer's gangway or on the quay, at shipowner's option. The trustees take the weight of water-borne goods from the shipper without checking it.

Craneage from the quay is paid by the ship unless otherwise arranged.

II. *In Discharging.*—Dues inwards on ship and cargo, with

exception of grain, are the same as outward dues. The steamer discharges the cargo, and delivers it to the plank-ends, where it is received and stowed in the shed by a master porter, employed by the shipowner, but paid by the consignee. Where required the goods are weighed on the quay by a sworn weigher, and then carted by the merchant; where they are not so weighed the goods pass over the trustees' "weighs." All labour on the quay, including weighing, is paid for by the merchant. Forty-eight hours from the completion of discharge are allowed by statute for the consignees to remove goods from the quay; but goods over fifty tons in one consignment are, by a practice almost uniform, allowed a longer time, varying with their weight, after which quay-rent is charged.

Delivery overside, which is rarely made, is made to the lighter from the steamer's plank-ends.

E. Practice of the Port of Hull.

I. *In Loading.*—The carrying trade is almost entirely confined to regular lines of Hull steamers owned by the Hull shippers, or in a few cases by their principals. Sailing ships or strange steamers rarely lie on the berth.

Engagements of goods are understood to be on the printed conditions of the special bill of lading used in each trade.

The greater portion of goods shipped come from inland by craft $\frac{\text{and}}{\text{or}}$ rail.

(A.) *Goods sent by Land to the Steamer.*—If sent by rail the railway company send an advice note shortly before the goods arrive; the shipper then sends delivery orders, and the railway company deliver accordingly, the cost of such delivery being included in the carriage.

No document accompanies the goods alongside, and no receipt is given by the steamer for the goods prior to shipment; but to authorize the loading of the cargo a shipping order is sent down to the shipping clerk at the steamer.

Goods are tallied into the steamer by the shipper when shipped, and they are not tallied before.

The dock company do not accept any responsibility for the safety of the goods in any way—the dock, quays, and sheds being open to the public, and not enclosed as at many other ports. Shipowners also repudiate any responsibility for the safety of goods lying under the dock company's sheds waiting shipment. The ship's responsibility commences when her tackle touches the goods.

Nearly all the goods shipped at Hull are shipped by the owners of the steamers as agents for merchants or others, who provide their own bills of lading for the particular ports required.

All goods passing over the dock company's quays both inwards and outwards incur wharfage.

(B.) *Goods sent alongside in Craft.*—The craft proceed alongside the steamer, if she is ready, and for goods so loaded no wharfage is incurred; otherwise they are landed from the craft in which they have come from inland, and trucked to the loading-shed at the carrier's expense; these goods pay wharfage.

When goods are shipped the shipping clerk at the steamer initials the bills of lading presented to him for that purpose, which are then taken to the shippers' or shipowners' office and signed.

Lighters if kept beyond five days incur demurrage at 7*s.* 6*d.* to 10*s.* per day.

(C.) *Labour.*—The railway companies deliver to dock company's sheds all goods, excepting heavy pieces, which latter are unladen from the waggons by shippers, who also pay for craning same on board the steamer.

Dock company cranes are then used, and pieces under five tons are charged 1*s.* per ton; over five tons a proportionate rate.

The shipowners employ their own men to load the vessel.

At Hull mates of regular liners do not tally the cargo on board; this is done by shipowner's tallymen.

In the case of sanitary pipes, tubes, pig-iron, &c., the railway companies only quote "station to station" rates, and such goods have to be unladen from the waggons by shippers.

II. *In Discharging.*—Steamers discharge general cargoes in the docks of the Hull Dock Company, also the Alexandra Dock Company—both private docks—usually in berths specially appropriated to them. In all the docks the shipowner is free to employ his own stevedores.

It is held by the shipowners that the ship's responsibility ceases when the goods pass the ship's rail; it certainly has ceased when they are clear of her tackle.

As a rule regular liners are discharged by their owner's stevedores on to quay, or into lighters, if latter are ready alongside on arrival; otherwise the cargo is landed under dock shed, and lies at consignees' risk and expense. The dock company allow consignees forty-eight hours for removal of cargo, after which time the goods are warehoused, or allowed by special arrangement to remain on quay at a rental.

A large portion of imports, grain, iron, flour, &c., received by the railway companies are discharged from the ship into the companies' own lighters, which are taken to the Lime Kiln Creek or Alexandra Dock and discharged into railway waggons, thus saving the charge of wharfage. All goods landed on the quay and delivered to railway waggons are so landed and delivered at consignee's expense.

The wharfage is always paid by the consignees and never by the shipowner.

All goods discharged direct from ships into canal boats are exempt from wharfage.

Grain and seed are weighed, &c., at the consignee's expense by the Hull Corporation sworn meters, or the dock company's meters, or in some cases by the consignees' meters. The weighing is generally supervised by shipper's agents, which ensures correctness.

The ship pays the cost of delivery on the scales on deck, and the consignee pays the cost of lifting off the scales and putting overside.

Regular liners commence discharging immediately after arrival during legal hours by authority of a "third report," or preliminary authority previously obtained from the Custom House authorities.

APPENDIX III.

The Principal Statutes affecting the Contract of Affreightment.

17 & 18 Vict. c. 104, s. 70.—Mortgages of Ships (*a*).

A mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship or any share therein, nor shall the mortgagor be deemed to have ceased to be owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available as a security for the mortgage debt.

18 & 19 Vict. c. 111.—Bills of Lading Act.

Whereas by the custom of merchants, a bill of lading of goods being transferable by endorsement, the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property: And whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bonâ fide* holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid: Be it therefore enacted, &c.:—

1. Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself (*b*).

2. Nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee, by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement.

3. Every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other persons signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: Provided, that the master,

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(*a*) Article 17c, *ante*, p. 32. (*b*) See Articles 56–59, 75, *ante*.

or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims (*c*).

24 Vict. c. 10, s. 6.—Admiralty Jurisdiction Act.

6. The High Court of Admiralty shall have jurisdiction over any claim by the owner, or consignee, or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales: Provided always, that if in any such cause the plaintiff do not recover £20, he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said Court (*d*).

25 & 26 Vict. c. 63, s. 54.—Limitation of Liability of Shipowner.

54. The owners of any ship, whether British or foreign shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say,

(1.) Where any loss of life or personal injury is caused to any person being carried in such ship;

(2.) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship;

(3.) Where any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat;

(4.) Where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat;

be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage, nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steam ships the gross tonnage without deduction on account of engine-room;

In case of any foreign ship which has been or can be measured according to British law the Surveyor-General of tonnage in the United Kingdom, and the chief measuring officer in any British possession abroad, shall, on receiving from, or by direction of, the Court hearing the case, such evidence concerning the dimensions of the ship as it may be found practicable to furnish, give a certificate under his hand, stating what would, in his opinion, have been the tonnage of such ship if she had duly measured according to British law, and the tonnage so stated in such certificate shall, for the purpose of this section, be deemed to be the tonnage of such ship.

(*c*) See Article 21, *ante*. (*d*) See Article 77, *ante*.

25 & 26 Vict. c. 63, s. 66–78.—DELIVERY OF GOODS AND LIEN FOR FREIGHT (*e*).

66. THE following terms used in the sections of this Act hereinafter contained, shall have the respective meanings hereby assigned to them, if not inconsistent with the context or subject-matter; that is to say,

The word "report" shall mean the report required by the customs laws to be made by the master of any importing ship:

The word "entry" shall mean the entry required by the customs laws to be made for the landing or discharge of goods from an importing ship:

The word "goods" shall include every description of wares and merchandise:

The word "wharf" shall include all wharves, quays, docks, and premises in or upon which any goods when landed from ships may be lawfully placed:

The word "warehouse" shall include all warehouses, buildings, and premises in which goods when landed from ships may be lawfully placed:

The expression "wharf owner" shall mean the occupier of any wharf, as hereinbefore defined:

The expression "warehouse owner" shall mean the occupier of any warehouse, as hereinbefore defined:

The word "shipowner" shall include the master of the ship, and every other person authorized to act as agent for the owner, or entitled to receive freight, demurrage, or other charges payable in respect of such ship:

The expression "owner of goods" shall include every person who is for the time being entitled, either as owner or agent for the owner, to the possession of the goods, subject in the case of lien, if any, to such lien.

67. Where the owner of any goods imported in any ship from foreign parts into the United Kingdom fails to make entry thereof, or having made entry thereof to land the same or take delivery thereof, and to proceed therewith with all convenient speed, by the times severally hereinafter mentioned, the shipowner may make entry of and land or unship the said goods at the times, in the manner, and subject to the conditions following; (that is to say),

1. If a time for the delivery of the goods is expressed in the charterparty, bill of lading, or agreement, then at any time after the time so expressed.
2. If no time for the delivery of the goods is expressed in the charterparty, bill of lading, or agreement, then at any time after the expiration of seventy-two hours, exclusive of a Sunday or holiday, after the report of the ship.
3. If any wharf or warehouse is named in the charterparty, bill of lading, or agreement, as the wharf or warehouse where the goods are to be placed, and if they can be conveniently there received, the shipowner in landing them by virtue of this enactment shall cause them to be placed on such wharf or in such warehouse.
4. In other cases the shipowner in landing goods by virtue of this enactment shall place them in or on some wharf or warehouse, on or in which goods of a like nature are usually placed; such wharf

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(*e*) See Articles 126, 127, *ante*, and Appendix II.; unloading in London.

or warehouse being, if the goods are dutiable, a wharf or warehouse duly approved by the commissioners of customs for the landing of dutiable goods.

5. If at any time before the goods are landed or unshipped, the owner of the goods is ready and offers to land or take delivery of the same, he shall be allowed so to do, and his entry shall in such case be preferred to any entry which may have been made by the shipowner.
6. If any goods are, for the purpose of convenience in assorting the same, landed at the wharf where the ship is discharged, and the owner of the goods at the time of such landing has made entry, and is ready and offers to take delivery thereof, and to convey the same to some other wharf or warehouse, such goods shall be assorted at landing, and shall, if demanded, be delivered to the owner thereof within twenty-four hours after assortment; and the expense of and consequent on such landing and assortment shall be borne by the shipowner.
7. If at any time before the goods are landed or unshipped, the owner thereof has made entry for the landing and warehousing thereof at any particular wharf or warehouse other than that at which the ship is discharging, and has offered and been ready to take delivery thereof, and the shipowner has failed to make such delivery, and has also failed at the time of such offer to give the owner of the goods correct information of the time at which such goods can be delivered, then the shipowner shall, before landing or unshipping such goods under the power hereby given to him, give to the owner of the goods or of such wharf or warehouse as last aforesaid twenty-four hours' notice in writing of his readiness to deliver the goods, and shall, if he lands or unships the same without such notice, do so at his own risk and expense.

68. If at the time when any goods are landed from any ship, and placed in the custody of any person as a wharf or warehouse owner, the shipowner gives to the wharf or warehouse owner notice in writing that the goods are to remain subject to a lien for freight or other charges payable to the shipowner to an amount to be mentioned in such notice, the goods so landed shall, in the hands of the wharf or warehouse owner, continue liable to the same lien, if any, for such charges as they were subject to before the landing thereof; and the wharf or warehouse owner receiving such goods shall retain them until the lien is discharged as thereinafter mentioned, and shall, if he fails so to do, make good to the shipowner any loss thereby occasioned to him.

69. Upon the production to the wharf or warehouse owner of a receipt for the amount claimed as due, and delivery to the wharf or warehouse owner of a copy thereof, or of a release of freight from the shipowner, the said lien shall be discharged.

70. The owner of the goods may deposit with the wharf or warehouse owner, a sum of money equal in amount to the sum so claimed as aforesaid by the shipowner, and thereupon the lien shall be discharged; but without prejudice to any other remedy which the shipowner may have for the recovery of the freight.

71. If such deposit as aforesaid is made with the wharf or warehouse owner and the person making the same does not within fifteen days after making it give to the wharf or warehouse owner notice in writing to retain it, stating in such notice the sum, if any, which he admits to be payable to the shipowner, or, as the case may be, that he does not admit any sum to be so payable, the wharf or warehouse owner may, at the expiration of such

fifteen days, pay the sum so deposited over to the shipowner, and shall by such payment be discharged from all liability in respect thereof.

72. If such deposit as aforesaid is made with the wharf or warehouse owner, and the person making the same does within fifteen days after making it give to the wharf or warehouse owner such notice in writing as aforesaid, the wharf or warehouse owner shall immediately apprize the shipowner of such notice, and shall pay or tender to him out of the sum deposited the sum, if any, admitted by such notice to be payable, and shall retain the remainder or balance, or, if no sum is admitted to be payable, the whole of the sum deposited, for thirty days from the date of the said notice; and at the expiration of such thirty days, unless legal proceedings have in the meantime been instituted by the shipowner against the owner of the goods to recover the said balance or sum or otherwise for the settlement of any disputes which may have arisen between them concerning such freight or other charges as aforesaid, and notice in writing of such proceedings have been served on him, the wharf or warehouse owner shall pay the said balance or sum over to the owner of the goods, and shall by such payment be discharged from all liability in respect thereof.

73. If the lien is not discharged, and no deposit is made as hereinbefore mentioned, the wharf or warehouse owner may, and, if required by the shipowner, shall at the expiration of ninety days from the time when the goods were placed in his custody, or, if the goods are of a perishable nature, at such earlier period as he in his discretion thinks fit, sell by public auction, either for home use or exportation, the said goods or so much thereof as may be necessary to satisfy the charges hereinafter mentioned.

74. Before making such sale the wharf or warehouse owner shall give notice thereof by advertisement in two newspapers circulating in the neighbourhood, or in one daily newspaper published in *London* and in one local newspaper, and also, if the address of the owner of the goods has been stated on the manifest of the cargo, or on any of the documents which have come into the possession of the wharf or warehouse owner, or is otherwise known to him, give notice of the sale to the owner of the goods by letter sent by the post; but the title of a *bonâ fide* purchaser of such goods shall not be invalidated by reason of the omission to send notice as hereinbefore mentioned, nor shall any such purchaser be bound to inquire whether such notice has been sent.

75. In every case of any such sale as aforesaid the wharf or warehouse owner shall apply the moneys received from the sale as follows, and in the following order:

(1.) If the goods are sold for home use in payment of any customs or excise duties owing in respect thereof:

(2.) In payment of the expenses of the sale:

(3.) In the absence of any agreement between the wharf or warehouse owner and the shipowner concerning the priority of their respective charges, in payment of the rent, rates, and other charges due to the wharf or warehouse owner in respect of the said goods:

(4.) In payment of the amount claimed by the shipowner as due for freight or other charges in respect of the said goods:

(5.) But in case of any agreement between the wharf or warehouse owner and the shipowner concerning the priority of their respective charges, then such charges shall have priority according to the terms of such agreement:

and the surplus, if any, shall be paid to the owner of the goods.

76. Whenever goods are placed in the custody of a wharf or warehouse owner under the authority of this Act, the said wharf or warehouse owner shall be entitled to rent in respect of the same, and shall also have power

from time to time, at the expense of the owner of the goods, to do all such reasonable acts as in the judgment of the said wharf or warehouse owner are necessary for the proper custody and preservation of the said goods, and shall have a lien on the said goods for the said rent and expenses.

77. Nothing in this Act contained shall compel any wharf or warehouse owner to take charge of any goods which he would not be liable to take charge of if this Act had not passed; nor shall he be bound to see to the validity of any lien claimed by any shipowner under this Act.

78. Nothing in the Act contained shall take away or abridge any powers given by any local Act to any harbour trust, body corporate, or persons whereby they are enabled to expedite the discharge of ships or the landing or delivery of goods, nor shall anything in this Act contained take away or diminish any rights or remedies given to any shipowner or wharf or warehouse owner by any local Act.

33 & 34 *Vict. c.* 97, *ss.* 15, 56, 66–68.—*Stamps on Charterparties and Bills of Lading* (*a*).

15. (1.)—Except where express provision to the contrary is made by this or any other Act, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty and a penalty of ten pounds, and also by way of further penalty, where the unpaid duty exceeds ten pounds, of interest on such duty, at the rate of five pounds per centum per annum from the day upon which the instrument was first executed up to the time when such interest is equal in amount to the unpaid duty.

And the payment of any penalty or penalties is to be denoted on the instrument by a particular stamp.

(2.) Provided as follows:

(*a.*) Any unstamped or insufficiently stamped instrument which has been first executed at any place out of the United Kingdom, may be stamped, at any time within two months after it has been first received in the United Kingdom, on payment of the unpaid duty only:

(*b.*) The Commissioners may, if they think fit, at any time within twelve months after the first execution of any instrument, remit the penalty or penalties or any part thereof.

56. (1).—A bill of lading is not to be stamped after the execution thereof.

(2.) Every person who makes or executes any bill of lading not duly stamped shall forfeit the sum of fifty pounds.

66. The duty upon an instrument chargeable with duty as a charterparty may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is last executed, or by whose execution it is completed as a binding contract.

67. Where any document chargeable with duty as a charterparty and not being duly stamped, is first executed out of the United Kingdom, any party thereto may within ten days after it has been first received in the United Kingdom, and before it has been executed by any person in the United Kingdom, affix thereto an adhesive stamp denoting the duty chargeable thereon, and at the same time cancel such adhesive stamp, and the instrument with an adhesive stamp thereon so affixed and cancelled shall be deemed duly stamped.

(*a*) See Article 1, *ante*.

68. An executed instrument chargeable with duty as a charterparty, and not being duly stamped, may be stamped with an impressed stamp upon the following terms: that is to say,

(1.) Within seven days after the first execution thereof on payment of the duty and a penalty of four shillings and sixpence;

(2.) After seven days but within one month after the first execution thereof, on payment of the duty and a penalty of ten pounds;

and shall not in any other case be stamped with an impressed stamp.

Schedule.

CHARTERPARTY, or any agreement or contract for the charter of any ship or vessel or any memorandum, letter, or other writing between the captain, master, or owner of any ship or vessel and any other person, for or relating to the freight or conveyance of any money, goods or effects on board of such ship or vessel ..	*Sixpence*
BILL OF LADING of or for any goods, merchandise, or effects to be exported or carried coastwise	*Sixpence*

36 & 37 Vict. c. 85, ss. 23–27.—*Dangerous Goods* (*b*).

23. If any person sends or attempts to send by, or not being the master or owner of the vessel carries or attempts to carry in any vessel, British or foreign, any dangerous goods; (that is to say), aquafortis, vitriol, naphtha, benzine, gunpowder, lucifer matches, nitro-glycerine, petroleum, or any other goods of a dangerous nature, without distinctly marking their nature on the outside of the package containing the same, and giving written notice of the nature of such goods and of the name and address of the sender or carrier thereof to the master or owner of the vessel at or before the time of sending the same to be shipped or taking the same on board the vessel, he shall for every such offence incur a penalty not exceeding one hundred pounds: Provided that if such person show that he was merely an agent in the shipment of any such goods as aforesaid, and was not aware and did not suspect and had no reason to suspect that the goods shipped by him were of a dangerous nature, the penalty which he incurs shall not exceed ten pounds.

24. If any person knowingly sends or attempts to send by, or carries or attempts to carry in any vessel, British or foreign, any dangerous goods, or goods of a dangerous nature, under a false description, or falsely describes the sender or carrier thereof, he shall incur a penalty not exceeding £500.

25. The master or owner of any vessel, British or foreign, may refuse to take on board any package or parcel which he suspects to contain goods of a dangerous nature, and may require it to be opened to ascertain the fact.

26. Where any dangerous goods as defined in this Act, or any goods which in the judgment of the master or owner of the vessel are of a dangerous nature, have been sent or brought aboard any vessel, British or foreign, without being marked as aforesaid, or without such notice being given as aforesaid, the master or owner of the vessel may cause such goods to be thrown overboard together with any package or receptacle in which they are contained; and neither the master nor the owner of the vessel

(*b*) Article 31, *ante*, p. 65.

shall, in respect of such throwing overboard, be subject to any liability, civil or criminal, in any Court.

27. Where any dangerous goods have been sent or carried or attempted to be sent or carried, on board any vessel, British or foreign, without being marked as aforesaid, or without any such notice having been given as aforesaid, and where any such goods having been sent or carried, or attempted to be sent or carried, under a false description, or the sender or carrier thereof has been falsely described, it shall be lawful for any court having Admiralty jurisdiction to declare such goods, and any package or receptacle in which they are contained, to be, and they shall thereupon be, forfeited, and when forfeited shall be disposed of as the Court directs.

The Court shall have and may exercise the aforesaid powers of forfeiture and disposal, notwithstanding that the owner of the goods have not committed any offence under the provisions of this Act relating to dangerous goods, and be not before the court, and have not notice of the proceedings, and notwithstanding that there be no evidence to show to whom the goods belong; nevertheless the Court may, in its discretion, require such notice as it may direct to be given to the owner or shipper of the goods before the same are forfeited.

See also sect. 28. 17 & 18 Vict. c. 104, s. 329, and 25 & 26 Vict. c. 63, s. 38, the previous statutes on the subject, are repealed by 36 & 37 Vict. c. 85, s. 33.

See also 38 & 39 Vict. c. 17, ss. 33, 34, 36, 39, 43; the provisions of which are too lengthy and special to justify their insertion here.

39 & 40 *Vict.* c. 80, s. 36.—*Managing Owner* (*c*).

36. The name and address of the managing owner for the time being of every British ship, registered at any port or place in the United Kingdom, shall be registered at the custom-house of the ship's port of registry.

Where there is not a managing owner, there shall be so registered the name of the ship's husband or other person to whom the management of the ship is intrusted by or on behalf of the owner; and any person whose name is so registered shall, for the purposes of the Merchant Shipping Acts, 1854 to 1876, be under the same obligations and subject to the same liabilities as if he were the managing owner. If default is made in complying with this section, the owner shall be liable; or if there be more owners than one, each owner shall be liable in proportion to his interest in the ship, to a penalty not exceeding in the whole £100 each time the ship leaves any port in the United Kingdom.

40 & 41 *Vict.* c. 39, s. 5 (*Factors' Act*, 1877) (*d*).

Where any document of title to goods has been lawfully indorsed or otherwise transferred to any person as a vendee or owner of the goods, and such person transfers such document by indorsement (or by delivery where the document is by custom, or by its express terms transferable by delivery, or makes the goods deliverable to the bearer), to a person who takes the same *bona fide* and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in *transitu* as the transfer of a bill of lading has for defeating the right of stoppage in *transitu*.

(*c*) Article 16A, *ante*.

(*d*) See Article 67, note, *ante*.

APPENDIX IV.

General Average.

(A.) York-Antwerp Rules (*a*).

I. No jettison of deck cargo shall be made good as general average. Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel.

II. Damage done to goods or merchandise by water which unavoidably goes down a ship's hatches opened, or other opening made for the purpose of making a jettison, shall be made good as general average, in case the loss by jettison is so made good.

Damage done by breakage and chafing, or otherwise from derangement of stowage consequent upon a jettison, shall be made good as general average, in case the loss by jettison is so made good.

III. Damage done to a ship and cargo, or either of them, by water or otherwise, in extinguishing a fire on board the ship, shall be general average, except that no compensation be made for damage done by water to packages which have been on fire.

IV. Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea-peril, shall not be made good as general average.

V. When a ship is intentionally run on shore because she is sinking or driving on shore or rocks, no damage caused to the ship, the cargo, and the freight, or any or either of them, by such intentional running on shore, shall be good as general average.

VI. Damage occasioned to a ship or cargo by carrying a press of sail shall not be made good as general average.

VII. When a ship shall have entered a port of refuge under such circumstances that the expenses of entering the port are admissible as general average, and when she shall have sailed thence with her original cargo, or part of it, the corresponding expenses of leaving such port shall likewise be admitted as general average; and whenever the cost of discharging cargo at such port is admissible as general average, the cost of reloading and stowing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted.

VIII. When a ship shall have entered a port of refuge under the circumstances defined in Rule VII., the wages and cost of maintenance of the master and mariners, from the time of entering such port until the ship shall have been made ready to proceed upon her voyage, shall be made good as general average.

(*a*) See Article 120.

IX. Damage done to cargo by discharging it at a port of refuge shall not be admissible as general average, in case such cargo shall have been discharged at the place, and in the manner, customary at that port with ships not in distress.

X. The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed; deduction being made from the shipowner's freight and passage-money at risk, of such port charges and crew's wages as would not have incurred had the ship and cargo been totally lost at the date of the general average act or sacrifice; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the arising of the claim to general average.

XI. In every case in which a sacrifice of cargo is made good as general average, the loss of freight (if any) which is caused by such loss of cargo shall likewise be so made good.

XII. The value to be allowed for goods sacrificed shall be that value which the owner would have received if such goods had not been sacrificed.

(B.) Resolutions of the Association of Average Adjusters, as to Port of Refuge Expenses, passed in July, 1885 (*b*).

1. "That in the opinion of this meeting it is desirable that adjustments should be drawn up in conformity with the following rules:—

2. "That when a ship puts into a port of refuge for the purpose of repairing damage which is itself the subject of general average, the outward as well as the inward port charges, and the warehouse rent and reloading of the cargo, equally with the discharging, shall be treated as general average.

3. "That when a ship puts into a port of refuge for the purpose of repairing damage which is itself the subject of particular average, the inward port charges and the cost of discharging the cargo shall be general average, the warehouse rent of cargo shall be a particular charge on cargo, and the cost of reloading and outward port charges shall be a particular charge on freight.

4. "That no distinction is drawn in practice between discharging cargo for its own safety, or for the safety of the ship, and for the purpose of effecting repairs necessary for the prosecution of the voyage.

5. "That when the cargo is discharged for the purpose of repairing, reconditioning, or diminishing damage to ship or cargo which is itself the subject of general average, the cost of storage on it and of reloading it shall be treated as general average, equally with the cost of discharging it."

6. "That damage necessarily done to cargo by discharging, storing, and reloading it, is treated as general average, when, and only when, the cost of those measures respectively is so treated."

(*b*) See Article 116, *ante*.

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